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**ARGUMENTS AND SPEECHES  
OF  
WILLIAM MAXWELL EVARTS**



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WILLIAM MAXWELL EVARTS  
OF  
NEW YORK

EDITED, WITH AN INTRODUCTION, BY HIS SON

SHERMAN EVARTS

*WILLIAM MAXWELL EVARTS*

*From a portrait by Thomas Hicks, painted in 1867. The  
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THE CENTURY CLUB

VOL. I

NEW YORK

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1900

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WILLIAM MAXWELL PERKINS

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ARGUMENTS AND SPEECHES  
OF  
WILLIAM MAXWELL EVARTS

EDITED, WITH AN INTRODUCTION, BY HIS SON  
SHERMAN EVARTS

*In Three Volumes*

VOL. I

New York  
THE MACMILLAN COMPANY  
1919

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**TO**  
**THE MEMORY OF MY MOTHER**  
**HELEN MINERVA WARDNER EVARTS**  
**THESE VOLUMES ARE AFFECTIONATELY DEDICATED**



## CONTENTS OF VOLUME I

	PAGE
Introduction .....	ix
<b>PROFESSIONAL ARGUMENTS</b>	
I. Brief and Argument in the New York Court of Appeals, January 24, 1860, in the case of The People of the State of New York against Jonathan Lemmon. (The Lemmon Slave Case) .....	3
II. Address to the jury in summing up for the Govern- ment, in the United States District Court, Southern District of New York, October 29, 30, 1861, in the case of The United States against Thomas Harrison Baker and Others, the Officers and Crew of the schooner "Savannah," on the charge of Piracy. (The Savannah Privateers) .....	91
III. Argument in the Supreme Court of the United States on behalf of the Government, February, 1863, in the case of Peter Miller et al., Claimants of the barque "Hiawatha" against The United States, and other cases. (The Prize Cases) .....	214
IV. Argument in the Supreme Court of the United States, February, 1866, in the case of Churchill against the City of Utica. (Bank Tax Case) .....	295
V. Argument in defence of President Andrew Johnson, April-May, 1868, before the Senate of the United States, sitting as a Court, in the Impeachment Trial of the President .....	340
VI. Argument in the Supreme Court of the United States, for the Government, December, 1868, in the case of Hepburn against Griswold. (Legal Tender Case) .	526

VII. Argument before the International Tribunal at Geneva, Switzerland, on behalf of The United States, under the Treaty of Washington, August, 1872. (The Alabama Claims).....	582
VIII. Argument before the Mixed Commission on British and American claims under the Treaty of Washington, August, 1873, for the claimants in the case of S. Isaac Campbell & Co., owners of the cargo of the Barque "Springbok," against The United States. (The Springbok Case).....	665

## INTRODUCTION

It is related of John Bright that when consulted about his biography he would turn the subject aside by saying, "My life is in my speeches." That his life was in his speeches may be said with much truth of Mr. Evarts. His position before the public of his day was, to be sure, in no sense upon a parallel with that of the great tribune of the English people, and the traditional environment, the training and education of the two men were wholly dissimilar. But the chief reminders of Mr. Evarts to-day are his speeches. Through them can best be recalled the man, whether they were the arguments of the advocate, or political speeches, or whether they appear in the form of elaborate orations at important commemorations, or in the lighter vein of occasional addresses.

At the very outset of his career Mr. Evarts leaped, at one bound, into prominence as an advocate in the profession in which his acknowledged supremacy formed, perhaps, the chief title to his fame. Just past twenty-four years old, the duty was by his senior associates assigned to him, as junior counsel for the defendant, of opening to the jury the case of the defense in the trial of the notorious forger, Monroe Edwards. The opportunities offered in this *cause célèbre* for a young man to win his spurs were unusual but manifest. That so important a part in the trial was given him by his elder brethren at the bar, chief among whom was Senator Crittenden of Kentucky, speaks well for the way in which he had acquitted himself in the earlier preparation and conduct of the case, a great part of which had fallen upon his shoulders. Expecting to occupy but a few minutes in his address to the jury, he spoke for an hour and a half, eliciting at the close a ripple of applause from the crowded audience that public interest in the cause had

brought to the court room. The applause of course was suppressed by the Court. It would have been no more than natural for any young man, however modest, to have felt at least a passing pleasure in so flattering a tribute, but what made a deep impression upon Mr. Evarts was the expression of enthusiastic encouragement that came from his distinguished associate. Many years after, he thus speaks, in conversation with one of Senator Crittenden's daughters, as related in the Life of Crittenden, of their association in this cause: "I shall never forget that trial," said Mr. Evarts, "in connection with your father. I was a young man on the threshold of my professional career, and your father's reputation was firmly and widely established as a lawyer and a statesman. His cordial manner throughout the trial is most gratefully remembered by me, and at its close he asked me to take a walk with him. During the walk he took a slight review of the trial, complimented me upon my course during its progress and the ability he was pleased to think I had manifested, and in conclusion, grasping my hand with warmth, he said, 'Allow me to congratulate and encourage you on the course in life you have adopted. I assure you that the highest honors of the profession are within your grasp, and with perseverance you may expect to attain them.' These words from Mr. Crittenden would have gratified the pride of any young lawyer and given him new strength for the struggles of his profession. I can truly say they have been of the greatest value to me through life. When I came to Washington to take part in the defense of President Johnson, the associations of the Senate Chamber recalled the memory of your father's words and renewed my gratitude for his generous encouragement of my early hopes."

When he recalled these words of Senator Crittenden the impeachment trial of the President, in which he had taken a leading part for the defense, had but just closed in a victory for the President. The succeeding ten years held yet in



store for Mr. Evarts a chief participation in the great Arbitration at Geneva, the Contest for the Presidency before the Electoral Commission, and that *cause célèbre*, which assumed in the imaginations and feeling of the whole country the proportions of a great public cause,—the famous trial of *Tilton vs. Beecher*. The history of the bar in this country finds no parallel in professional public employments such as these falling to the lot of one man.

In reviewing his own career he was wont to speak of the turn of events in the country's history that presented during his active professional life so many cases of far-reaching public importance and interest. In this sense fortune favored him. It is not for the writer to discuss the performance, by Mr. Evarts, of the tasks thus set for him; but this may be said: that each honorable and responsible employment fell to him as the natural consequence of his adequate discharge of that which had preceded.

If we were to look for the turning point in his career at which he received a general and permanent recognition from the profession and the public as a learned lawyer as well as a brilliant and skilful advocate, we should find it in his appearance before the New York Court of Appeals in 1860, representing the State of New York in the *Lemmon Slave Case*. His title to knighthood was then established, and the profession looked forward to him as the future leader and champion to take the place of his elders when they were gone. His former chief, Mr. J. Prescott Hall, thus writes: "I have read your 'Lemmon' speech *through* twice and think it the best you ever made and perhaps the best you ever will make; but you must try to beat yourself."

In the Supreme Court of the United States he was constantly employed in private causes of importance and often retained by the Government in the paramount questions that the exigencies of our Civil War brought for solution before that great tribunal.

As a lawyer, Mr. Evarts's extraordinary intellectual gifts enabled him to grasp, with a readiness and power of absorption and assimilation that excited the wonder and admiration of his contemporaries, all the essential and salient points of the most complicated cases upon the first interview with his client or his brother lawyer. Mr. Southmayd,\* for many years his partner, himself a very great lawyer of that generation, was wont to speak of this power of apprehension, which would mentally anticipate and complete the situation before the narration of the facts was finished. The case had by that time been accurately discriminated and some great principle of law unerringly applied. His other distinguished partner, Mr. Joseph H. Choate, whose name completed the title as it added to the fame of the great firm of Evarts, Southmayd & Choate, has spoken of him as "the quickest witted man I ever met on either side the water."

The writer has heard Mr. Evarts speak of how he would go into a trial with Mr. Choate when the only opportunity he had had of any acquaintance with the case was in the walk from their office to the court room. In the tremendous pressure of a busy lawyer's laborious life those few moments were all that could be spared to the consideration of ordinary lawsuits, where the detailed preparation for trial had fallen of course into competent hands. But those few moments seem to have sufficed for effective service to his junior at the trial.

He treated all his cases in a very large way; he made luminous the philosophy and science of jurisprudence in its application to the case in hand; he lifted the cause to a very high plane, and notably was this true in the Johnson impeachment and the Beecher trial; by remarkable clearness of statement he disentangled the greatest confusion of facts and brought them into harmony with the fundamental principles upon which the contention of his cause rested; by apt al-

\* Charles F. Southmayd, 1824-1911.

lusion and illustration, by anecdote and often by a play of humor and fancy, his presentation of the driest case interested the Court, as by his forceful eloquence he drove home the principles he advocated; while his unfailing courtesy and consideration, wholly without the taint of assumed superiority, won the admiration and affection of Bench and Bar.

But hand in hand with these gifts went the instinct for thoroughness—thoroughness of preparation, thoroughness of presentation. It was not in his nature to rest content with one cogent, irrefragable point and by reiteration in various forms and from varying points of view place his dependence upon that and that alone; but, regardless of the maxim, “many men, many minds,” he sought to convince by every honorable and fair suggestion of reason that might find lodgment and have a persuasive influence with the tribunal he addressed. Mr. O’Conor,\* more often opposed to, than associated with, Mr. Evarts, once said to a would-be client, whose retainer he was for some reason unable to accept, “Go to Mr. Evarts; he will bring forward *every possible* point, present *every possible* argument the case admits of.”

Allusion to this trait recalls to the writer a characteristic remark of Mr. Evarts while he was preparing to argue in the Court of Appeals of New York the case in which he made his last appearance in any court. It was not unusual to see him, towards the close of a busy day of concentrated labor over a brief or an opinion, come from his own room and, going in to see one of his partners or sometimes sitting in the general office, enter into a conversational discussion of the subject that was on his mind. In the course of such a discussion over this case (*Post vs. Weil*, now cited as a leading case) Mr. Evarts said, “Well, I have seven points, one for each judge.”

\* Charles O’Conor, 1804–1884.

Thus, too, in the trial of cases, some bit of evidence that might seem trifling and wholly negligible, coming unobserved or unheeded into the testimony, was in his final argument turned to great and telling effect. He seized upon it at once and discerned clearly its bearing on the main issue; and in his final presentation its effect was all the more forceful for being skilfully brought from its hiding place in the great mass of testimony and its true character displayed in the bright light of his clear reason.

His oral arguments were as thorough as his preparation of causes. His words of advice to a young lawyer, "Don't be content with a 'good enough' argument," illustrate his own rule in the presentation of his causes. Thus in several cases, the subject matter of which has lost all shadow of present day interest, his arguments remain not only as models to emulate, though difficult of attainment, but in themselves of interest and instruction. In making a selection, therefore, of the speeches of Mr. Evarts which it might seem proper to include within the covers of one book, we have not felt that, in the case of his legal arguments, any more restricted rule of choice need apply than that which we have endeavored to follow in those of another character. An inclusion of those of historic interest should not exclude all of those, the interest in which may be confined to the profession.

But Mr. Evarts was more than a lawyer. With what may be regarded as an hereditary instinct for public service he very early manifested a zealous interest in political affairs. He was a devoted admirer and disciple of Mr. Webster, and to the last one of his ablest defenders. In a long forgotten weekly publication called "The New World," under the editorship of Park Benjamin, there appear in the issues of October 2 and October 16, 1841, two political articles from Mr. Evarts's pen entitled respectively, "Mr. Webster's Position" and "Mr. Tyler and The Whig Party." The first was in answer to the attacks upon Mr. Webster from a large

body of the Whigs because of his remaining as Secretary of State in Tyler's Cabinet, and the second a review of the general political situation and of President Tyler's adequacy to meet it, as it was affected by the breaking apart of the two elements of the party. For this disruption of the party, the elevation to the Presidency of Mr. Tyler, through the death of President William Henry Harrison, was largely responsible.

These articles, among the earliest of the young lawyer's essays at political discussion and interesting solely on this account, may appropriately find a place in this collection. Their style reminds one of the Letters of Junius, and one may safely conjecture a conscious or unconscious imitation, as a model, of this unknown writer. His own comments on these early efforts throw an interesting side light on their production and their effect so far as it concerned him. "I have sent you a copy," he writes to his friend, Richard H. Dana, Jr., under date of October 2, 1841, "of this week's 'New World' as containing for its 'leader' an article by me—I am tired of hearing 'Mr. Webster's Position' spoken of in the tone used in Whig circles here, and have written the paper *con amore*. It is as long as sixteen pages of common pamphleteering and was written after 8 o'clock one evening and in the printer's hands next morning at 7, so that it can hardly be deemed an *elaborate* production. As I am proposing soon to make my pen *venal*, I am writing now for practice and facility and am not altogether displeased with this first attempt. If your own judgment should be favorable, suppose you do me the honor to submit it to your father's *indulgent* opinion."

Again, on October 12, 1841, he writes, "I am obliged to your father for his friendly criticism on my fugitive article. . . . This week I have promised an article on Tyler, but as it must be ready early to-morrow morning and is as yet unwritten I am doubtful whether it appears." Whatever

may have been the judgment of the elder Dana, we may well suppose it to have been for the most part literary. How this young man's efforts impressed others, he with modest pride discloses to his friend Dana, when in January, 1842, he writes: "Professional business has claimed so much of my attention that my 'political pen' (which Professor Felton wrote Benjamin was one of 'the most powerful ones in the country') has been idle. During my late visit to Washington, I had the honor of an interview (at his desire) with his Excellency the Secretary of State, who, as Mr. Choate informed me, was *delighted* with my article. I am more amused than seriously gratified at the results of my aimless and casual efforts." "His Excellency the Secretary of State" was of course Daniel Webster and Mr. Choate was Rufus Choate, then occupying Mr. Webster's seat in the Senate.

Mr. Evarts's "political pen" remained idle for the rest of his life; but in every discussion of public affairs his voice was heard where it might affect the course of public opinion.

During the period following the Compromise Measures of 1850 and up to the election of Lincoln there was one dominant subject of either public or private discussion. We refer, of course, to the subject of slavery, its existence in the Southern States, the supremacy of its advocates in the councils of the Government, and their efforts to extend the institution throughout the whole country as a part of the national policy.

At the time of the passage of the Compromise measures, Mr. Evarts, then thirty-two years old, had attained such prominence that, at the great Union meeting at Castle Garden in New York, he was one of the speakers. The meeting was called together to sustain before the people the policy of the Government in the Compromise measures, and Mr. Evarts spoke in maintenance of the Constitutionality of the Fugitive Slave Law and in earnest appeal for obedience to its provisions by the people of the Northern States. This

"Castle Garden" speech, his first recorded public utterance, was, in a narrower sphere, as much a subject of discussion, as it bore upon his attitude towards the burning question of the day, as that much debated seventh of March speech of his great exemplar in the Senate. In the years that followed, the Castle Garden speech was brought forward against Mr. Evarts as evidence of a leaning in favor of slavery not to be expected and much to be deplored in one of his antecedents.

The public mind could not reconcile an abhorrence of slavery as an institution with adherence to the Constitution and the Law, that recognized the institution as a necessary evil and supported the rights, under the Constitution, of slave owners, in the localities where the system of slavery prevailed. No man was ever more hostile to slavery than Mr. Evarts, throughout his life, and it perhaps was fortunate for a final estimate that the Castle Garden speech, unlike the seventh of March speech, was at the beginning and not at the end of a career. In the heated state of the public mind and conscience over this all-absorbing question of slavery it was perhaps natural that everyone who stood for the preservation of the Union and the Constitution and the sanctity of law should be, though illogically and unjustly, suspected of a friendly complacency towards the institution of slavery or at least of indifference to its evils. But any doubt or confused notion of Mr. Evarts's attitude towards slavery was set at rest when he gave one fourth of his property to the Emigrant Aid Company in the "Kansas Crusade," when he spoke at the Broadway Tabernacle in 1856, and when he made his argument in the Lemmon Slave Case.

The circumstances of Mr. Evarts's contribution to the cause of the Emigrant Aid Company is thus related by Mr. Eli Thayer in an account of a meeting of gentlemen at a private house in New York in 1855: "After my address, which occupied a little more than an hour, a young man, tall and thin, arose and began to speak as follows: 'Ever

since my Castle Garden speech, you know I have been called a Hunker Whig. Now, what reason you had to suppose that such a man would care whether slavery were extended or restricted I do not know. Therefore I do not know your reasons for inviting me to attend this meeting. But you did invite me and I have come. I am glad that I am here and I thank you for calling me. I have heard many speeches, on many occasions, upon the slavery question; but never until now have I listened to any practical elucidation of the subject. Like thousands of others I have been waiting for an opportunity to contend successfully against slavery without violating the laws or sacrificing the Constitution and the Union. Such an opportunity is now presented. I rejoice in it and shall embrace it. Now, though I am called a Hunker Whig and though I am poor, for I am not worth four thousand dollars, I joyfully give my cheque to the Emigrant Aid Company for one thousand dollars.' This speaker was William M. Evarts."\*

No method of selection should properly exclude these earliest political speeches. They are as important and as interesting in their representative significance as those more elaborate productions when Mr. Evarts was the sole speaker of the evening before a crowded audience in Cooper Union, upon the invitation of prominent citizens of New York to give his views in public on the issues of the day.

Mr. Evarts's repute as a man of public spirit, as a scholar and an orator soon brought to him invitations to deliver addresses, in the language of the day, "orations," at important celebrations. Of these the first was delivered in 1853 at the centenary of the Linonian Society at Yale, the last in 1888 at the dedication at Auburn of the statue of his political friend and leader, William H. Seward.

Present day readers need to be reminded of the fame of the great debating societies at Yale College that flourished

\* A History of the Kansas Crusade, by Eli Thayer, p. 203.



from the latter part of the eighteenth to the middle of the nineteenth century. They furnished to the youth of those generations who sought their education at Yale College a nursery and training ground for the development of those moral and intellectual faculties that best adapt a man to a position of influence and power in the community in which his lot is thrown. Doubtless, in the fuller and more complex life of our universities to-day there may be found, among the student activities, organizations that take the place and have the influence of these old debating societies. But it was with keen and unfeigned regret at the time that the older graduates of Yale saw the uninterrupted decline and final discontinuance of these institutions, beyond the power of all efforts to revive them. The place they filled in the college life of his day, and the purposes they were calculated to accomplish were thus described by Mr. Evarts, in this oration on "Public Life," in the following passage:

"While, then, we greet the college as the gracious mother of our intellectual life, from whose full breasts we drew the nutriment of learning, it is in this LINONIAN SOCIETY that we, who have met for this centennial commemoration, found the playground and arena, the palestra, the forum, the *agora*, in which the new born vigor was exercised and trained. It was here that the faculties acquired were first applied, and here had the prelude and preparation for the public labors and conflicts of real life."

These commemorative addresses, six in number, include, besides those mentioned above, the New England Society oration, entitled "The Heritage of the Pilgrims," delivered in 1854 before the New England Society of New York, his Eulogy on Chief Justice Chase delivered upon the invitation of the Alumni of Dartmouth College at the commencement of 1874, his centennial oration delivered at Philadelphia, July 4, 1876, and his oration at Newburgh, New York, in 1883, on the invitation of the joint committee of Congress,

at the centennial of Washington's Headquarters at Newburgh. Thus the honor was awarded to him of delivering the oration at the last, as well as at the first, of the series of national centennial celebrations of the Revolutionary period.

These formal addresses were not mere exhibitions of rhetorical phrase making, but scholarly discourses, pregnant with the philosophy of history and of politics, clothed in stately English and inspired with a genuine love of his country and reverence for its institutions.

Through a rare and very happy combination of faculties the fame of Mr. Evarts as an advocate and an orator was matched by his reputation as a wit. There is hardly a book of contemporaneous biography or reminiscences that does not contain some bright saying, some *mot*, some witticism of Mr. Evarts, and there were not infrequently attributed to him, as is always the case with such reputations, jests that on their face bore the stamp of counterfeit. With this gift, combined with a merry and spontaneous humor, he always found a welcome at public dinners either as presiding or as one of the principal speakers. Mr. Carter,\* himself a great lawyer and orator, in a graceful and appreciative tribute to Mr. Evarts, thus spoke of this feature of his career:

"In another field—and one of no small consequence—he was *facile princeps*; I mean that of after-dinner speaking. He may be said to have created a revolution in that art. His brilliant wit, his command of language, his large acquaintance with men and things and his keen sense of humor made him a most captivating speaker on such occasions. And this seemed so easy in him that many others thought it was really easy, and he had many imitators, who, however, were not often so successful."

An appreciative editorial in one of the leading journals at the time of Mr. Evarts's death thus speaks of these social gifts:

\* James Coolidge Carter, 1827–1905.

"He was not only a great lawyer, an able statesman and a great character, but he was a unique New Yorker. His was the wit, diamond-pointed, that sparkled without wounding. His was the humor as debonair as dry, and as genial as subtle. His was the power of epigram, antithesis or characterization that gave to thought the light for its entrance into the mind, and to fancy the barb that winged its course to the recesses of the imagination and to the centre of the heart. His was the anecdotal power that united the finality of culture with the simplicity of experience, and which gilded conversation with the sheen of gold, and gave to it the charm that made listening a luxury, enjoyment contagious, imitation a failure, emulation a temerity and admiration spontaneous. And all this concurred with an involution and circumlocution of oratorical style that, whether natural or acquired, was alike the envy and despair of colleagues or of rivals." \*

Of Mr. Evarts's "style" to which allusion is made by this sympathetic writer it may be said that as the printed page diminishes the force of the spoken word as uttered, so it magnifies into a fault a method and form of expression that was most effective as employed by Mr. Evarts. It is the spoken language of the man, aptly and often finely expressive of the thought behind it, that is to be found in the pages that follow. In those productions, which Mr. Evarts was wont to call his "set orations," and which were delivered from manuscript, where there was the opportunity for careful and critical preparation, is to be found the best and truest examples of his "style," which may or may not meet the requirements of the best literary canons. One may find in the quaint words of Fuller where he speaks of Richard Hooker, the "judicious" Hooker, an apt description of Mr. Evarts's style. The entertaining theologian Fuller writes thus: "His style was long and pithy, driving on a whole flock of several clauses, before he came to the close of a sentence; so

\* St. Clair McKelway, in the "Brooklyn Eagle."

that when the copiousness of his style met not with proportionable capacity in his auditors, it was unjustly censured for 'perplexed, tedious and obscure.'"\*

Let us record here also the witty retort of Mr. Evarts to one who in good natured banter had twitted him on his long sentences. In 1879, being then Secretary of State, he presided at the public dinner in New York tendered to Mr. Thomas Bailey Potter, one of the few members of parliament who had been, in England, staunch supporters of the northern side during the Civil War. Mr. Samuel D. Babcock, then president of the New York Chamber of Commerce, in closing his speech at the dinner, had thus expressed himself: "Let us hope, gentlemen, that if differences should arise in the future between Great Britain and the United States, men will be found like Mr. Potter and Secretary Evarts, who, after a calm and dispassionate discussion, *clothed though it be with sentences as long as the English language can supply*, will arrive at an amicable settlement."

Mr. Evarts, on rising to introduce the next speaker, began by saying that the English was a language the true efficacy of which the gentleman who last sat down did not seem to appreciate. Not only was it fine in quality but in quantity it was absolutely marvelous. What wonder then that a public servant should try to check the volubility of his countrymen by consuming large portions of it himself. He then added, "I don't wish that our guest should carry away with him a wrong impression in regard to this alleged fault. The only persons in this country who are opposed to long sentences are the criminal classes."

Mr. Evarts's speeches, as we have seen, quite naturally classify themselves under these four divisions: professional arguments, political speeches, commemorative orations and occasional addresses, including in the last his after-dinner speeches. Any effort to make a selection must meet the

\* Fuller's Church History, IX, s. vii, 40, 53.

hazard of omitting or including one or more as to which, for this or that consideration, another's judgment would apply a different rule. Many motives have had their influence upon the result and if the general and principal purpose of the publication is amply met it will suffer no serious abatement by any incidental errors of choice in minor instances. These arguments and speeches are gathered from many scattered sources, from newspapers and pamphlets and from separate publications of more permanent form, and have been thus brought together that they may be readily accessible, that they may serve to preserve the memory of Mr. Evarts and that they may be in a permanent form of preservation themselves. The writer makes here his grateful acknowledgment for valuable aid received in the preparation of this work from Mrs. Graham B. Blaine, a granddaughter of Mr. Evarts.

We have refrained in these introductory words from any strictly biographical statement of Mr. Evarts's career, content with such suggestive allusions as occur in considering his many and diversified attainments. He was first and last the great lawyer and advocate; one who, as Pericles for Athens, had for his profession a "lover's enthusiasm." He found in its active and large employments ample scope for the widest exercise of his intellectual powers, and opportunity to exert a great moral influence in his day and generation, while the recognized relations that existed between the profession and public discussion and public action afforded the occasion for an active and constant participation in this wider field of influence. It was within the ranks of the profession that his close friendships were to be found, and from its ranks came the most informed and sincerest appreciation. If we look for some expression from him that may exhibit his personal relations, his personal feelings, towards the members of the profession that he loved and revered, we may find it in the closing words of his response at the public

dinner tendered him by the Bar of New York in 1868, at which Mr. O'Connor presided. In concluding his speech on this occasion he says:

"And, now, Mr. President, closing these observations, desultory and far too long, I beg to be permitted to say a word or two about the good fortune that has attended my life. I do not know that in the thirty years which have almost elapsed since, as a student, I came to your city, any man has ever done me an unkindness or an injustice; and if I could feel that I might say the same of my own conduct,—that I have never done an unkindness or an injustice to a brother in our profession—if I could say this, I should feel that I had in some degree repaid the great debt which I owe to you all.

"But it seems to me as if I were indebted to others from the beginning to the end. I do not speak of how much I owe to my masters in the law school, Story and Greenleaf—but I may be permitted to say that no man can owe a greater debt to a teacher, a master, an example and a kind friend, than I owe to Daniel Lord, and I may be permitted to say, too, that no young man can be better aided in the early days of his profession than I was by Prescott Hall, my master and my friend. And my partners still about me—my partners, never changed, but only added to in twenty-eight years of professional life—they are present at this table, and your knowledge of them forbids and makes it unnecessary for me to speak of them. I recognize the debt to all—the constant obligation; and when at last the seal shall be set to my life (until which we are admonished to call no man fortunate) I may well be deemed fortunate if any law student, any young lawyer or any dying veteran of the profession shall feel even to a moderate degree toward me as I do toward these my masters and my friends."

We venture to add the answer to his wish in the sincere and fervent words of that other great lawyer, Mr. Carter, when he said of Mr. Evarts, "In his death a great light has

## INTRODUCTION

xxv

been extinguished,—no, not altogether extinguished. It will long continue to shine in his many noble utterances which history and literature will preserve; in the memory of the patriotic services which he rendered to his country; in the affectionate regard of a thousand friends, and in the bright example he set as a citizen, statesman and man.”

SHERMAN EVARTS.

Windsor, Vermont.

February 6, 1918.





## **PROFESSIONAL ARGUMENTS**



## I

# BRIEF AND ARGUMENT IN THE NEW YORK COURT OF APPEALS IN THE LEMMON SLAVE CASE

## NOTE

In November, 1852, Jonathan Lemmon and Juliet Lemmon, his wife, citizens and residents of the State of Virginia, came to New York City by boat from Norfolk, Virginia, bringing with them eight negroes, who were in Virginia held as slaves and as the property of Mrs. Lemmon.

Their ultimate destination was Texas where slavery was an institution recognized by the laws of that State. It was their purpose to remain in the City of New York only for the short interval between their arrival and the departure from that port of a boat for Texas, upon which it was their intention to embark in the completion of their journey. They lodged their slaves in a house in Carlisle Street, New York, where they were discovered by a negro named Louis Napoleon. He thereupon presented to the Hon. Elijah Paine, a judge of the Superior Court of the City of New York, his petition for a writ of Habeas Corpus, for the production before him of the eight negroes, that the legality of their detention under restraint might be judicially determined. The writ was issued November 6, 1852, and on the return of the writ an answer was interposed setting up the ownership of the eight negroes by Mrs. Lemmon under the laws of Virginia and that their sojourn in New York was *in transitu* merely, on the way to another slaveholding State, with no purpose or intent of remaining within the jurisdiction of the State of New York any longer than the exigencies of the journey from Virginia to Texas by the route taken required. To this return to the writ the petitioner interposed a general demurrer, stating that the facts set forth did not constitute a legal cause for the restraint of the liberty of the negroes.

Upon the questions of law thus raised the case was heard. E. D. Culver and John Jay appeared for the petitioner, while H. D. Lapaugh and Henry L. Clinton represented the respondent. Judge

Paine decided the case in favor of the petitioner and by final order, dated November 13, 1852, gave the negroes their freedom. The case is fully reported in New York Superior Court Reports, 5 Sandford, 681.

Immediately upon the rendering of this decision the respondent sued out a writ of *certiorari* to bring the case up for review to the general term of the Supreme Court.

The decision of Judge Paine excited universal comment in tones of admiration or execration as the sympathies and judgments of people inclined to one side or the other. The Governor of Virginia, by authority of its Legislature, directed the Attorney-General of the State to prosecute the appeal in connection with such counsel as he might employ. Under this authority Mr. Charles O'Connor was engaged as counsel in behalf of the State of Virginia. In 1855, under similar action of the Legislature of New York, the Governor of that State appointed E. D. Culver and Joseph Blunt as counsel to be associated with Ogden Hoffman, then Attorney-General of New York, to defend the interests of the State on the appeal prosecuted by the State of Virginia. On the death of Mr. Hoffman in 1856, the Governor appointed Mr. Evarts, in his place, to represent the State of New York on the appeal. The case was argued before the general term of the Supreme Court in December, 1857, and the decision of the Court below was affirmed, Justice Roosevelt dissenting. The case is reported in New York Supreme Court Reports, 26 Barbour, 270. An appeal was taken to the Court of Appeals. The case was argued in that Court on January 24, 1860, and following days, by Mr. O'Connor for the appellants, and by Mr. Joseph Blunt and Mr. Evarts for the respondent. In March, 1860, the Court affirmed the decisions below. Opinions were delivered for affirmance by Judge Denio and Mr. Justice Wright, Judge Davies and Justices Bacon and Welles concurring. Chief Judge Comstock and Mr. Justice Clerke dissented, an opinion being delivered by Mr. Justice Clerke for reversal of the Supreme Court. Judge Selden expressed no opinion. The case is reported in 20 New York Court of Appeals Reports, page 562. Mr. Evarts submitted the following points and delivered the argument that follows,

## THE LEMMON SLAVE CASE

### POINTS\*

**FIRST POINT.**—The writ of Habeas Corpus belongs of right to every person restrained of liberty within this State, under any pretense whatsoever, unless by certain judicial process of Federal or State authority.

2 Rev. Stat., p. 563, No. 21.

This right is absolute, (1) against legislative invasion, and (2) against judicial discretion.

Cons., Art. 1, No. 4.

2 Rev. Stat., p. 565, No. 31.

In behalf of a human being, restrained of liberty within this State, the writ, *by a legal necessity*, must issue.

The office of the writ is to enlarge the person in whose behalf it issues, unless *legal cause* be shown for the restraint of liberty or its continuation; and enlargement of liberty, unless such cause to the contrary be shown, flows from the writ by the same legal necessity that required the writ to be issued.

1 Rev. Stat. 567, No. 39.

**SECOND POINT.**—The whole question of the case, then, is, does the relation of slave-owner and slave, which subsisted in Virginia between Mrs. Lemmon and these persons while there, attend upon them while commorant within this State, in the course of travel from Virginia to Texas, so as to furnish legal cause for the restraint of liberty complained of, and so as to compel the authority and power of this State to sanction and maintain such restraint of liberty.

\* On the argument of the case Mr. Evarts submitted these Points, stating that they were intended to be taken in connection with those of his associate, Mr. Blunt, and that he had not thought it necessary to repeat the citations to be found on Mr. Blunt's points, and on which they both relied.

I. Legal cause of restraint can be none other than an authority to maintain the restraint which has the force of law within this State.

Nothing has, or can claim, the authority of law within this State, unless it proceeds—

(A) From the sovereignty of the State, and is found in the Constitution or Statutes of the State, or in its unwritten common (or customary) law; or—

(B) From the Federal Government, whose Constitution and Statutes have the force of law within this State.

So far as the Law of Nations has force within this State, and so far as “by comity,” the laws of other sovereignties have force within this State, they derive their efficacy, not from their own vigor, but by administration as a part of the law of this State.

Story Conf. Laws, Nos. 18, 20, 23, 25, 29, 33, 35, 37, 38.

*Bank of Augusta vs. Earle*, 13 Pet. 519, 589.

*Dalrymple vs. Dalrymple*, 2 Hagg. Consist. Rep. 59.

*Dred Scott vs. Sanford*, 19 How. 460–1, 486–7.

II. The Constitution of the United States and the Federal Statutes give no law on the subject.

The Federal Constitution and legislation under it have, in principle and theory, no concern with the domestic institutions, the social basis, the social relations, the civil conditions, which obtain within the several States.

The actual exceptions are special and limited, and prove the rule. They are—

1. A reference to the civil conditions obtaining within the States, to furnish an artificial enumeration of persons as the basis of Federal Representation and direct taxation, distributively between the States.

2. A reference to the political rights of suffrage within the States as, respectively, supplying the basis of the Federal suffrage therein.

3. A provision securing to the citizens of every State within every other the privileges and immunities (whatever they may be) accorded in each to its own citizens.

4. A provision preventing the laws or regulations of any State governing the civil condition of persons within it, from operating upon the condition of persons "held to service or labor in one State, under the laws thereof, escaping into another."

None of these provisions, in terms or by any intendment, support the right of the slave-owner in his own State or in any other State, except the last. This, by its terms, is limited to its special case, and necessarily excludes Federal intervention in every other.

Const. U. S., Art. 1, sec. 2, subd. 1 and 3.

Art. IV, sec. 2, subd. 1 and 3.

Laws of Slave States, and of Free States, on Slavery.

*Ex parte Simmons*, 4 W. C. C. R. 396.

*Jones vs. Van Zandt*, 2 McLean, 597.

*Groves vs. Slaughter*, 15 Peters, 506, 508-510.

*Prigg vs. Penn*, 16 Peters, 611-612, 622-3-5.

*Strader vs. Graham*, 10 How. 82, 93.

*New York vs. Miln*, 11 Peters, 136.

*Dred Scott vs. Sanford*, 19 How. 393.

Ch. J. 452.

Nelson, J. 459, 461.

Campbell, J. 508-509, 516-17.

The clauses of the Constitution of the United States touching the commercial power of the Federal Government have no effect, directly or indirectly, upon the question under consideration.

Cons. U. S., Art. 1, sec. 8, subd. 3.

Cons. U. S., Art. 1, sec. 9, subd. 1, 5.

The Passenger Cases, 7 How. 283.

*Groves vs. Slaughter*, *ut supra*.

*New York vs. Miln*, *ut supra*.

III. The common law of this State permits the existence of slavery in no case within its limits.

Cons., Art. 1, No. 17.

Sommersetts Case, 20 How. St. Trials, 79.

*Knight vs. Wedderburn*, *Id.* No. 2.

*Forbes vs. Cochrane*, 2 B. & C. 448.

*Shanley vs. Harvey*, 2 Eden, 126.

The Slave Grace, 2 Hagg. Adm. 118, 104.

Story Confl. Laws, No. 96.

Co. Litt. 124 b.

IV. The statute law of this State effects a universal proscription and prohibition of the condition of slavery within the limits of the State.

1 R. St., p. 656, No. 1.—“No person held as a slave shall be imported, introduced or brought into this State, on any pretence whatever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave, who hath been introduced or brought in this State contrary to the laws in force at the time, shall be free.”

No. 16.—“Every person born within this State, whether white or colored, is free; every person who shall hereafter be born within the State, shall be free; and every person brought into this State as a slave, except as authorized by this title, shall be free.”

2 R. St., p. 664, No. 28.

Laws 1857, p. 797.

*Dred Scott vs. Sanford*, 19 How. 591–595.

THIRD POINT.—It remains only to be considered whether, under the principle of the Law of Nations, as governing the intercourse of friendly States, and as adopted and incorporated into the administration of our municipal law, *comity* requires the recognition and support of the relation of slave-owner and slave between strangers passing through our territory, notwithstanding the absolute policy and compre-



## THE LEMMON SLAVE CASE

hensive legislation which prohibit that relation and render the civil relation of slavery *impossible* in our own society.

The *comity*, it is to be observed, under inquiry, is (1) of the State and not of the Court, which latter has no authority to exercise comity in behalf of the State, but only a judicial power of determining whether the main policy and actual legislation of the State exhibit the comity inquired of; and (2) whether the comity extends to yielding the affirmative aid of the State to maintain the mastery of the slave-owner and the subjection of the slave.

Story Confl. Laws, No. 38.

*Bk. Augusta vs. Earle*, 13 Pet. 589.

*Dred Scott vs. Sanford*, 19 How. 591.

I. The principles, policy, sentiments, public reason and conscience, and authoritative will of the State sovereignty, as such, have been expressed in the most authentic form, and with the most distinct meaning, that slavery, whencesoever it comes, and by whatsoever casual access, or for whatsoever transient stay, SHALL NOT BE TOLERATED UPON OUR SOIL.

That the particular case of slavery during transit has not escaped the intent or effect of the legislation on the subject, appears in the express permission once accorded to it, and the subsequent abrogation of such permission.

1 Rev. St., Part 1, ch. XX, Tit. 7, Nos. 6, 7.

Repealing Act, Laws 1841, ch. 247.

Upon such a declaration of the principles and sentiments of the State, through its Legislature, there is no opportunity or scope for judicial doubt or determination.

Story Confl. Laws, Nos. 36, 37, 23, 24.

Vattel, p. 1, Nos. 1, 2.

II. But, were such manifest enactment of the sovereign will in the premises wanting, as matter of general reason and universal authority, the *status* of slavery is never upheld in the case of strangers, resident or in transit, when the domestic

laws reject and suppress such *status* as a civil condition or social relation.

(A) The same reasons of justice and policy which forbid the sanction of law and the aid of public force to the proscribed *status* among our own population, forbid them in the case of strangers within our territory.

(B) The *status* of slavery is not a natural relation, but is contrary to nature, and at every moment it subsists, it is an ever new and active violation of the law of nature. Of this no more explicit or unequivocal statement can be framed than is to be found in the Constitution of the State of Virginia. Thus, the first article of the Bill of Rights of that Constitution declares:

“That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

It originates in mere predominance of physical force, and is continued by mere predominance of social force or municipal law. Whenever and wherever the physical force in the one stage, or the social force or municipal law in the other stage, fails, the *status* falls, for it has nothing to rest upon.

To continue and defend the *status*, then, within our territory, the stranger must appeal to *some* municipal law. He has brought with him no system of municipal law to be a weapon and a shield to this *status*; he finds no such system here. His appeal to force against nature, to law against justice, is vain, and his captive is free.

(C) The Law of Nations, built upon the law of nature, has adopted this same view of the *status* of slavery, as resting on force against right, and finding no support outside of the jurisdiction of the municipal law which establishes it.

(D) A State proscribing the *status* of slavery in its domestic system, has no apparatus, either of law or of force, to maintain the relation between strangers. It has no code of the slave-owner's rights or of the slave's submission, no processes for the enforcement of either, no rules of evidence or adjudication in the premises, no guard-houses, prisons, or whipping-posts to uphold the slave-owner's power and crush the slave's resistance. But a comity which should recognize a *status* that can subsist only by force, and yet refuse the force to sustain it, is illusory. If we recognize the fragment of slavery imported by the stranger, we must adopt the fabric of which it is a fragment and from which it derives its vitality.

If the slave be eloiigned by fraud or force, the owner must have replevin for him or trover for his value.

If a creditor obtain a foreign attachment against the slave-owner, the sheriff must seize and sell the slaves.

If the owner die, the surrogate must administer the slave as assets.

If the slave give birth to offspring, we have a native-born slave.

If the owner, enforcing obedience to his caprices, maim or slay his slave, we must admit the *status* as a plea in bar to the public justice.

If the slave be tried for crime, upon his owner's complaint, the testimony of his fellow-slaves must be excluded.

If the slave be imprisoned or executed for crime, the value taken by the State must be made good to the owner, as for "private property taken for public use."

Everything or nothing, is the demand from our *comity*; everything or nothing, must be our answer.

(E) The rule of the Law of Nations which permits the transit of strangers and their property through a friendly State does not require our laws to uphold the relation of slave-owner and slave between strangers.

By the Law of Nations, men are not the subject of property.

By the Law of Nations, the municipal law which makes men the subject of property, is limited with the power to enforce itself, that is by its territorial jurisdiction.

By the Law of Nations, then, the strangers stand upon our soil in their natural relations as men, their artificial relation being absolutely terminated.

*The Antelope*, 10 Wheat. 120, 121, and cases *ut supra*.

(F) The principle of the law of nations which attributes to the law of the domicil the power to fix the civil *status* of persons, does not require our laws to uphold, *within our own territory*, the relation of slave-owner and slave between strangers.

The principle only requires us (1) to recognize the consequences in reference to subjects within our own jurisdiction (so far as may be done without prejudice to domestic interests), of the *status* existing abroad; and (2) where the *status* itself is brought within our limits and is here permissible as a domestic *status*, to recognize the foreign law as an authentic origin and support of the actual *status*.

It is thus that *marriage* contracted in a foreign domicil, according to the municipal law there, will be maintained as a continuing marriage here, with such traits as belong to that relation here; yet, incestuous marriage or polygamy, lawful in the foreign domicil, cannot be held as a lawful continuing relation here.

Story Conf. Laws, Nos. 51, 51, a., 89, 113, 114, 96, 104, 620, 624.

(G) This free and sovereign State, in determining to which of two eternal laws it will by *comity* add the vigor of its adoption and administration within its territory, viz., a foreign municipal law of force against right, or the law of nations, conformed to its own domestic policy, under the

same impulse which has purged its own system of the odious and violent injustice of slavery, will prefer the Law of Nations to the law of Virginia, and set the slave free.

*Impius et crudelis judicandus est, qui libertati non favet.*  
*Nostra jura IN OMNI CASU libertati dant favorem.*

Co. Litt. *ut supra*.

#### ARGUMENT

*If the Court please:* The question brought originally under judicial examination and for practical determination was an interesting and important one, as it respected the liberty of the persons whose fate was to be determined, under our law, by our jurisprudence, and by the judgment of our Courts. Their number was considerable; and ever in enlightened communities, there is no question so important as that which touches the liberty of man—in a free country, important that the full measure of that liberty shall not be unjustly and unlawfully circumscribed, and in a despotic country, or in a country where slavery exists, important that the poor remnant of that liberty may not be still more abridged. Therefore, that imprisonment should continue an hour longer than it ought by law, or that there should be constraint of limb or voice that the law does not allow, is ever a consideration that should call off courts of justice from the ordinary deliberations on matters of property, however great, until this question be determined, and this great wrong, if it be one, be redressed. But when the question of liberty is presented in the persons not only of so many, and not only for their lives, but for the whole stream of their posterity forever, I apprehend that no court of justice (though limiting the gravity of this question to that of the fate of these eight persons and their posterity), ever had occasion to consider a graver question of human liberty, or ever to be more careful that they should not, by an erring judgment, determine the doom of these people forever.

The question is here, and it is not to be evaded. Whatever is done concerning the future of these persons, is done by the law of New York, imposed by her own State authority, or by the law of New York, resting upon and imposed by the paramount authority of the Federal Government. Whatever of doubt, of difficulty there may be, whatever of obscurity or uncertainty there may be, on this question, the determination of this Court, as that of last resort in this State, finally impresses the right, the sanction, the force, that are necessary, and thus establishes, continues, or permits the slavery of these men and women.

Now, beyond controversy, as it is the duty of an advocate, so much more is it the duty of a Court, when a legal question, within legal limits is to be disposed of, to meet that question and determine it, as a juridical inquiry; and when the responsibilities of the judge and of the advocate are discharged, if the law drives into slavery these unfortunate appellants to your judgment, then, as servants of the law, you are acquitted. The ministers of justice do not always perform an agreeable duty. But, every consideration drawn from general jurisprudence, drawn from the nature of man, drawn from the immutable qualities of right and wrong, may be rightfully invoked in such an inquiry. Unless we live under a government that has renounced all these principles, that, on inducements of policy, of interest, or of whatever perverse influence has guided the public councils, stands upon a denial of natural right, upon the overthrow of general justice, and has established the public policy of injustice and oppression; unless the Court sits under a government that has avowed and maintained, and calls upon it to avow and maintain such a desertion of common right and natural justice, then, all arguments, and all illustrations that bring the judgment of a free Court of a free people to determine what their law is, and how it should be administered, are, in this inquiry, pertinent and appropriate.

But, if the Court please, the magnitude of this question is not limited to its pressure upon the liberty of the particular persons whose case is before the Court. As a part (and a part not to be evaded) of the consideration and determination, both in the legislative councils and in the courts of judicature, of the nation, and of the separate States, of the question that grows out of the existence in this country, in slavery, of negroes and their descendants, the present inquiry attracts great public attention.

Beyond the *status* of domestic slavery, as a local institution—established, administered, construed and defended in and by the States, which, under our Federal system maintain it—three forms of question will obtrude themselves on public attention, and cannot be avoided. The one is—What is the power and authority of the Governments of the States that continue and maintain the institution of slavery, in respect of the free citizens or free inhabitants of this country, to protect by their exclusion, or by their control while within these communities, this institution of slavery, against violent, against legal, against moral, against religious, against social influences, that may disintegrate and destroy it? This right, asserted to the extent of *absolute control*, upon the necessity of self-preservation, has never been permitted to be the subject of calm, judicial inquiry within the States that support slavery. Whether free black citizens, or free black inhabitants (if they be not citizens), of the free States of the Union, shall be permitted in their pursuits of navigation or otherwise, to come within the territory of a slaveholding State; whether white mechanics, merchants, landowners, whether teachers and preachers, free citizens of the United States, shall be permitted within the slaveholding States to establish their residence permanently or temporarily, and pursue their vocations; or whether the institution of slavery, of domestic authority, shall have the power to subjugate the free people of the country, morally, socially,

and politically, in order that the slaves may be held in personal bondage—these are questions that are exhibiting themselves in a form the most significant and important in various parts of this country. It has never yet been permitted in the slaveholding States, that judicial inquiry should be instituted and prosecuted, to the result of a legal determination of these questions.

Another most important, and in the public mind most absorbing, political topic, touches the footing of this domestic institution of slavery in, and in respect to, the territories of the United States, that are protected by no government or laws except those of the Federal Union. This question, agitated in the public councils, agitated in the popular mind, and discussed to a certain extent in the Supreme Court of the United States, is one, opinions and determinations upon which are supposed to have an important bearing upon the third and last remaining inquiry connected with the general subject. And that is, what is the legal position of the domestic institution of slavery, as existing in the slave States, in regard to slaves and their owners, when brought within the free States, that are governed by their own constitutions and laws, expounded and administered by their own courts? That is the question now before your honors; and that question concerns what is of more vital importance to a political community than anything else, its *sovereignty*. It touches not only this question of sovereignty, vital to the existence of an independent community, but sovereignty in its most central point—that of the control of the civil and social condition of persons within its borders. For it may be very well understood that if a sovereign State has not the power of determining the political, the civil, the social, the actual condition of persons within its borders, it is because some other power has that control; and how it can be admitted that a foreign government, a foreign jurisprudence, a foreign social condition, can intrude itself into an independ-



ent State, and establish for all time, or for any time, for some persons, or for one person, that condition within the State into which the intrusion is made; how this admission can consist with the fundamental idea of the sovereignty, or of the separateness of a political community, it passes my intelligence to comprehend.

But, upon the view of the learned counsel who sustains the pretensions of the State of Virginia, that State either by its own authority, or by the aid of the Government of the United States, has something to say concerning the legal condition of persons within this State. The pretension that by the paramount dominion of the Federal Constitution we are bound to admit within our borders the institution of slavery, is a claim which, in my judgment, permits of no limitation whatever, of time or of circumstance. It presents, therefore, a question of the first importance. If it were presented to you as merely a question of *comity*, to which you were obliged by your sense of what is fitting and possible, under the recognized will and authority of our own Legislature, why, although the public mind might be awakened, the proposition would not be so alarming as, that we are controlled in this matter, not by any judgment of our own as to what is proper, or fitting, or hospitable, but are bound by a superior authority, and to results to which we can put no limits.

Now, if the Court please, it will be found that the very general view, which has been suggested by the counsel for the appellants here, of their claim respecting obligations and duties on our own part, serves no good purpose whatever, but tends to withdraw the attention of the Court from the real subject of judicial inquiry. What is the subject of the present judicial inquiry, and how does it arise?

Within this State, and within the limits of the City of New York, were found eight men and women of color; and it was alleged, in such authentic form as our statutes require,

to our accredited judicial officer, that these eight persons were restrained of their liberty. What of that? What is it that institutes such an inquiry, and what is the point to be disposed of when such an inquiry is raised? The inquiry is instituted under our statute of Habeas Corpus, one of the main guards and protections of our liberty. For the words "liberty" and "slavery"—which we may get so used to as to think there is not much difference between them, except that they suggest matters of jurisprudential consideration as to the limits and extent of the one and the other—liberty and slavery, as civil conditions, are practically nothing more nor less than the establishment of laws, and the methods provided for their enforcement, to define and protect the one institution and the other. And, when you look for the liberty that the people of New York enjoy, you find it in their laws and in their system of government. You find their political liberty in the share that they have in the election and change of all persons that form and administer their government. You find their civil liberty, as matter of private and personal right, in the guaranties of the Constitution, in the methods of the public administration of justice, in the trial by jury, in the Habeas Corpus; and you may have all the fanciful notions of exemption from bodily restraint in the world, yet if you do not have the Habeas Corpus act or some equivalent mode of attracting the public eye and conscience in administering the law, to the condition of people who are restrained of their liberty, you have no personal liberty, for you have no efficient mode of vindicating and defending it.

What does our Habeas Corpus act require, first, in respect to the institution of the investigation, when it shall be alleged to a judicial officer that any person within the State is restrained of his liberty? Why, it creates an absolute legal necessity that the question of fact and of right should at once be withdrawn from the personal or forcible control which

exists, and be transferred instantly and completely to the actual and legal control of the State. That is the Habeas Corpus act, that the question of the restraint of a human being in this State, upon any allegation that it exists in fact, should be at once rescued from the determination of force and personal control, and made a question of the State's maintaining the restraint. From that time, in the theory of the law, the restraint, in fact, cannot continue a moment, but by its maintenance by the *law* of the State, enforced and supported by the *power* of the State.

So essential, in a free State, is this practical form of sustaining personal liberty, that it is protected in a way and with a vigor that no other right whatever is protected, or, consistently with some other general and necessary principles. is supposed to be possibly capable of protection. The right to the writ of Habeas Corpus is protected against invasion from the legislative power of the State, under the Constitution; a protection which it shares with various other private rights. But this writ as a matter of judicial administration, is put upon a footing on which the exercise of no other judicial procedure whatever is put—that is, upon an absolute legal necessity that, upon suggestion, the writ shall issue. The judge to whom application is made has no discretion to withhold the writ; if he refuses it, he exposes himself to fine, as well as to all the consequences of dereliction of absolute official duty.

Why is this? It is to secure, as matter of necessary practical result, that, whatever the future progress of the inquiry and its final determination shall be, the condition of personal and forcible restraint shall not continue one moment, but that, on the fundamental basis of this universal principle of free governments—that whatever is rightly done, is rightly done by law—the transfer shall immediately, completely and irresistibly be made from the private force that accompanied the actual restraint, into the region of law and judicial

determination, and from that moment, either the restraint ceases or the law continues it and compels it.

(The Court took a recess.)

I have said, if the Court please, that the policy of our law in support of personal liberty, had seen fit to devise a process whereby any actual restraint upon a person within this State shall be immediately changed, in fact, from the restraint by private force into the restraint of the law, and by the public force; that thereafter the law restrained, and, by its authority alone, was any continued deprivation of liberty possible. I have said that this process was the important practical and effectual support of liberty without which liberty might remain as a name, and despotism exist as a system.

Am I wrong in claiming this efficient agency for the writ of Habeas Corpus, and in attributing to it when issued, the consequences I have suggested? The personal liberty of the people of this State might doubtless have been left, in the first instance, to their own protection, or for them to find, by ordinary remedies, redress for its infraction. Thus it might have been left to a person held in bondage or under restraint in this State, to relieve himself by force if he could, and then in an action to recover damages for false imprisonment. This would be so if the Habeas Corpus act were not in force, and this contest of private force would be determined by superior strength as to who should obtain the victory.

The distinctive trait of the Habeas Corpus act is that it will not tolerate this "*let alone*" policy—that it will not permit the will or the power of prince or magistrate, or public officer, or private person to have sway, but always and only the *power of the law*—that it will take an active part in the protection and defence of liberty, and that the existence

of the *fact* of restraint shall be the only prerequisite to remove the question from this region of force and submission into the public jurisdiction of the law.

If this be so, and no one can deny that it is so, from the moment the writ of Habeas Corpus was issued in this case, if these eight persons are held in this State for any period, brief or permanent, in slavery, or if they are sent away from this State into slavery, it is done by the law of the State of New York, and by it alone. For the private dominion of Jonathan and Juliet Lemmon over these persons has been removed by the writ of Habeas Corpus, and they stand in this court for its judgment and control, as the law shall award. The process once set in motion, there is no escape from its regular procedure and its final result, and the statute permits no answer that shall continue the restraint, unless it shall disclose some cause in law sufficient.

Now, what is answered to the exigency of this writ? The petition for the writ alleges that these persons "were, and each of them was, yesterday confined and restrained of their liberty on board the steamer, *Richmond City*, or *City of Richmond*, so called, in the harbor of New York, and taken therefrom last night, and are now confined in house No. 5 Carlisle street in New York, and that they are not committed or detained by virtue of any process issued by any court of the United States, or by any judge thereof, nor are they committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree." The supposed cause of restraint is then set forth by the petitioner, but as the return states it, we need not consider the charges of the petition in this behalf. The answer gives as legal reason for holding them in the restraint thus admitted to exist, that in the State of Virginia, the respondents, Jonathan and Juliet Lemmon, being there residents and citizens, these eight persons were their slaves;

that they, planning an emigration from Virginia to Texas, where the institution of slavery, equivalent to that under the laws of Virginia, existed, took passage in a steamer to the city of New York and there landed, awaiting the commencement of a new voyage, that should carry them to Texas; that their residence or being in the State of New York was as part of that transit, and with no other plan or design in regard to their remaining except to complete that proposed voyage from New York to Texas. And they claim that the restraint exercised is justified under the laws of New York, by reason of the facts they have stated. That is the case, and that being the case, it is for the court to determine whether by the laws of New York, that is legal cause of restraint; and if it be, to give the whole power of the law and of the State of New York to maintain that restraint. The statute provides that upon the return made to the writ "the court or officer before whom the party shall be brought on such writ of Habeas Corpus, shall immediately after the return thereof, proceed to examine into the facts contained in such return, and into the cause of the confinement or restraint of such party. If no *legal cause* be shown for such imprisonment or restraint, or for the continuation thereof, such court or officer shall discharge such party from the custody or restraint under which he is held."

The necessary result of this procedure, introduced by the writ of Habeas Corpus, is thus shown to be the discharge of these persons from the control under which they are found, unless some *legal cause* shall have, by the return, been shown for the continuance of the restraint complained of. The only question, then, was, and is, whether the relation of slavery (as described in terms in the return), existing in Virginia, and existing conformably to the laws of Virginia, is a cause for the restraint by our law, of these persons under the dominion of their owners as slaves in New York, during a brief or other stay, under the circumstances detailed in the

return, and so as to compel the authority of our State to be actively exerted to maintain and continue such restraint of liberty.

We are first, then, brought to the inquiry of what a legal cause of restraint is. It is, I take it, an identical proposition to say, that legal cause of restraint can be none other than an authority to maintain the restraint which has the force of law within this State. From whatever source this authority of law is derived—whether it be directly from the State legislation, or is found in the unwritten common (or customary) law of the State itself, or whether it be from the Federal Government, whose Constitution and statutes have as perfect authority within this State, as laws originating by State enactment, or by the adoption for the time being under the principles of comity, or for whatever reason, of a foreign system of law (as a fragment and casually, if you please), it must have the compulsory force of law in this State or it is no answer to the writ. Under this last head of authority the inquiry is, whether our law, finding such restraint maintained or permitted by other communities with which we have intercourse, chooses to say that, under certain circumstances and limited conditions, it will interpose and continue that restraint on persons passing through our territory. Your Honors will see, that though you may ascribe to these three sources of authority, the means or grounds for the restraint under consideration, yet after all, they are but two; the authentic and original law of our State, and the authentic and original law of the Federal Government. For the legal policy that may make possible and exceptional, in favor of strangers, a condition of things that we do not permit to our own citizens or tolerate in our own population, though called by the name of *comity*, must after all, be a part of the jurisprudence either of the Federal Government in force within this State, or of the State Government, administered by our Courts.

Having thus, as I think, rightly put before the Court the real point for its consideration, and assigned the true limits from which the rules for its adjudication must be furnished, let us look for a moment at the position taken by our opponents. As I understand the learned counsel who supports the pretensions of the State of Virginia, and maintains the case of the appellants here, the form and substance of his argument may be briefly divided thus: The first point, on which he insists, which includes mere general topics, expanded through the first seventeen pages of his brief, is designed as an argument to propitiate the Court to a favorable consideration, or at least to an impartial estimate of this stranger, slavery; to show that it is not as bad as it has been painted, and that some of the men who have given it an ill name, have themselves had complacency and toleration for other social faults and defects, in the communities in which they lived, that were quite as bad. Its purpose is to put this Court in a disposition to find no repugnance to this institution of slavery, in their own breasts, in the public conscience, or in the sentiment or in the action of this State, as evinced by any legislation, any principles of its common law, any judicial determinations, except as they may find written in the statutes, some imperative prohibition of slavery. He would bring you to think that if this were an open question (and he will contend that it has been left an open question, so far as any statute of the State is concerned)—there are many reasons of conscience, of justice, of benevolence and of duty, which require the maintenance and continuance of the institution of slavery, and require every man, whose hands are untied, to give it a helping and supporting hand; that you must find yourselves subdued by some hard system of positive law, that prohibits you from being hospitable to this social and civil institution of slavery, to justify this Court in frowning upon it. In some future stage of my argument I shall have, more completely and



distinctly perhaps, to direct the attention of the Court to some of the many positions and illustrations which are embodied in this forensic plea for slavery. But let me say now, that if this Court and our people cannot be brought to look kindly upon its fragmentary and temporary existence in our midst, but by trampling down, step by step, all the great barriers against oppression that have been raised by the reason, the justice and wisdom of age after age—but by undermining the principles that have built up a great, free and powerful nation, to be the habitation of liberty and justice for the great population of to-day, and for generation after generation yet to come; if the rights, poor, feeble, casual, of the black man, cannot be overborne or overthrown without tearing in pieces the law of nations—confounding all distinctions between civilization and barbarism—subduing right by might, and thinking that force and power can, any day it chooses, call evil, good, and good, evil, and that a few soft phrases and intricate sentences can obscure, even for an hour, the difference between right and wrong, and the fundamental distinction between a rule of force and a rule of right: then this class of the community, while here in the State of New York, is abundantly safe; for an adoption of the maxims and the principles that are necessarily claimed in this deliberate argument, that force is right, and power is law, can only be expected by reversing the whole tide of civilization, and by bringing into discussion, in courts of justice, that rest upon nothing but the supremacy of reason for their authority, propositions that make foolish the existence of tribunals of justice, when contests of force alone are important or interesting to man and to society.

The next proposition of the counsel for the appellants is that, up to the time of this judicial inquiry in the Court below, there was no legislative act of our State that, by its effect or in its terms, operated to prevent our Courts from

withholding a judgment of liberty, on a writ of Habeas Corpus, from slaves brought hither from another State of the Union; and further, that if the statutes of the State, rightly construed, should be held to have that force and effect, under the Constitution of the United States, such statutes are invalid, and no judgment that was based upon such a construction of the law of this State, could be sustained. And this prohibitory control of the Constitution of the United States, over this subject, is based upon the commercial powers of the Federal Government to regulate that kind of intercourse between the States of the Union, and upon the provision or guaranty of the Constitution to the citizens of each State, that they shall be entitled to all the privileges of citizens in the several States. In gaining this effect from the latter clause, the learned counsel holds, by a construction, I think, somewhat novel, that its meaning is, that the citizens of each State, shall have in each other State, not the same rights as the citizens of the State into which they come, but, what the learned counsel describes as, the rights of a *citizen of the United States*, in each State into which they come; and, this being rather a shadowy description of rights, not to be found, I think, defined in any constitution or by any laws, the proposition ends in claiming as the effect of the clause in question, that the citizens of each State, coming into another State, besides the privileges and immunities of citizens enjoyed there, which they are to receive in full, are also to be accorded all the rights they had at home; and that this clause (in its natural, and in its established, construction so easily understood, so consonant with general jurisprudence, so important and useful in preserving relations between the citizens of different States, by according freely and at once to every citizen who comes here, the same rights which our citizens have) is turned into an instrument and means of the absolute overthrow of State sovereignty. That is to say, that, under this clause of the Constitution,

instead of protecting the citizens of every State against disparaging distinctions in any State, between them and the citizens of that State—instead of being a shield and a guard—the Federal Constitution arms them with the codes and statutes of their own State, which they carry with them, as an additional system of law, to be administered in their favor, while they remain lawfully within the State to which they have made their visit. I say it comes to this substantially, in terms; and it must come to this if it varies at all from what seems to me, the simple and necessary construction, that its effect is limited to securing to citizens of other States, while here, the same rights and privileges with our own citizens. For, although it is very easy to talk of a “citizen of the United States,” it is very difficult to find a citizen of the United States, that is not a citizen of some State, and it is very difficult to find in my judgment, a citizen of any State who is not a citizen of the United States. I do not see where you will find, in the law or Constitution, any description of citizenship of the United States, as distinguished from citizens of the States, except in regard to persons brought in *ab extra*, persons of foreign nativity where an operative citizenship, of the United States, proceeds from the Federal power. But none of us that were born here ever got any right of citizenship of the United States, except by, and from, and in, the fact that we were citizens of some State.

The course that I shall think suitable, if the Court please, to adopt in this direct legal inquiry, under this writ of Habeas Corpus now before the Court, will be to say, and, I think to show, that, as for legal cause for the restraint of these persons within the city of New York, under the circumstances detailed, the Constitution of the United States, and the Federal statutes, give no law whatever—none—and that they have nothing to do with it. In the first place, I state, as a point of elementary constitutional law, that the Federal

Constitution, and legislation under it, have, in principle and theory, no concern with the domestic institutions, the social basis, the social relations, the civil conditions, which obtain within the several States. Is there any doubt on that subject? We are all familiar with the divisions of political opinion, that have arisen on the question whether this or that particular power sought or claimed to be exercised by the Government of the United States, was or was not within the grants of power in the Federal Constitution. We all know that, as lawyers, we are not unfrequently called upon to determine, whether this or that exercise of governmental power by a State authority is or is not an infraction upon the express or implied power of the Federal Government. But, every lawyer knows that the whole jurisprudence of State and Federal courts on these subjects—as to whether the express power or necessary implication of power exists in the United States, and whether the particular action of a State Government is a violation of some express prohibition upon its action in the Federal Constitution, or is an intrusion and encroachment upon some explicit or implied power of the Federal Government—every lawyer, I say, knows that the whole matter involved within the limits of this inquiry constitutes, as it were, but the merest fraction of the general rights, laws, institutions, employments, conditions, relations, which build up civilized society, and make up the body of the subjects of the jurisdiction of the several State Governments.

It is very difficult to see how it can be claimed that, upon any general theory, the Federal Government has anything to do with any questions regulating the rights and titles to property—regulating the distribution of rank and orders in society, if they should ever come to exist, or at all touching the great social fabric, which makes up a civil State. I am, then, justified in saying that, upon the whole theory of the two governments, State and Federal, we are

quite free from any *implication*, or *intendment*, that the Federal power has anything to do with the civil conditions and social arrangements within the different States.

If we look at the history of the Constitution, and of the opinions of the men who framed it, we find that a determined stand was made against anything like the establishment of a general government that should exercise authority, at all, over the general fabric and system of the domestic conditions of the people. All the different provinces had laws, and customs, and arrangements, with which they were satisfied, and they were unwilling, in the language of Mr. Ellsworth, of Connecticut, "to trust the Federal Government with their domestic institutions." And we know that, since the formation of the Constitution, its amendments, and the political controversies that have arisen under it, have all tended to confine the General Government to, and restrict the State Governments only in, the particular and main lines of authority that are delegated in the Federal Constitution. Now, if we had not looked at the Federal Constitution in this light, it would surprise us to see, in how few provisions, and in relation to how few subjects, it at all touches, or makes mention of, the condition of people within the States. There are but four references, as I construe the Constitution, that can bear this construction.

The first is a reference to the civil conditions obtaining within the States to furnish an artificial enumeration of persons, as the basis of Federal Representation and direct taxation, distributively between the States.

The Constitution establishes a rule for the distribution of representation in the Federal Government, among the different States of the Union, by a reference to the condition of people within it—that is to say, instead of adopting the natural numeration of population throughout this country, as the basis of distribution of Federal Representation, it does establish an artificial rule or method of count, for that

purpose recognizing social differences of condition in parts of the population. It does not make any discrimination between *States*, but says throughout all the States, from Massachusetts to Georgia, you shall count all the people that come within a certain description (which is intended to include everybody but slaves, without the odium of naming them), and then count three-fifths of the rest, who can be none others than slaves.

The second reference of the Federal Constitution is to the *political rights of suffrage within the States*, as supplying the basis of the Federal suffrage in them, respectively.

Here, the Federal Government comes into the States merely to seek what it shall find there: not in the remotest degree to establish anything, to preserve anything, to affirm or continue anything. It is demonstrable that each State has a complete control over the suffrage within it, for all Federal representation.

The Constitution has expressly declared, that whatever each State shall consider a proper basis of suffrage for representation in the more numerous body of its legislature, shall be the basis of suffrage for representation in Congress.

The third provision, one to which I have already referred, is that for securing to the citizens of every State, within every other, the privileges and immunities (whatever they may be) accorded in each to its own citizens. Let us look at the phraseology of that section, to see whether it bears any other construction than the simple one which I have attached to it. The words are these:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

It is claimed by the learned counsel for the appellants, that this should be construed as if it read: "The citizens of each State shall be entitled to all the privileges and immunities of *citizens of the United States*—in the several States."

But it is very plain as it seems to me, in the first place, that there is nothing in the condition of a citizen of the United States, which would warrant the suggestion, that there was any intention that he should carry into any State social or political rights which citizens there did not enjoy. And, in the second place, the natural and necessary construction of the clause is, that the privileges and immunities secured to citizens of each State, while within another, are the privileges and immunities that citizens of the State, where such privileges and immunities shall need to be claimed, enjoy. It establishes, and should establish, a rule of equality and uniformity, not of distinction and confusion.

The fourth provision of the Constitution, which comes under our consideration, is familiarly known as the "Fugitive Slave Clause," and reads as follows: "No person held to service or labor in one State, under the laws thereof, *escaping* into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up upon claim of the party to whom such service or labor may be due."

This clause undoubtedly, does affect the condition of persons in the States of the Union. It, undoubtedly, does affect an escaped slave, while within any State of this Union into which he shall have escaped, with certain restraints, impediments, burdens and consequences of restoration, which are not imposed by the government or laws of the State in which he is found. And here, for the first, does the Federal Government, by its own force, put upon this particular class of our population, found in the special predicament of escape from the State in which they owed service, the bonds of Federal obligation, and destroys entirely their recourse to the protection which, otherwise, they could have claimed from the laws of the State in which they are found.

Now I have said that these are the only clauses of the Constitution that can be held in any sense to relate, at all, to the condition of persons, civil or political, in the States of the Union, for any purposes of Government; and that none of these clauses touch the question now under discussion. The argument to this effect in respect to the "Fugitive Slave Clause" is unanswerable.

The general principles of jurisprudence and the decisions of the Federal courts, all show that, but for the existence of this clause, an escaped slave would be held by no restraint or coercion, except such as the State in which he was found chose to establish and enforce; and that the rights of the master would rest upon nothing but the comity or the legislation of the State into which the escape had been made. The existence of this clause in the Constitution is not only evidence that the right of reclamation would not have existed but for its insertion; but it is an argument of the utmost force, that even with this clause in the Constitution, no right exists for his master to hold in servitude, in the State of refuge, even an escaped slave. An escaped slave, after he is restored, is held in slavery by the laws of the State whence he escaped and to which he returned, as he was before. But while he is in another State, the "Fugitive Slave Clause" gives no authority *to hold* and use him as a slave. There is no legal answer that can be made to our writ of Habeas Corpus, in respect to a slave escaped into this State, except that he is held by authority of Federal legislation, under the Constitution, providing the mode of his recapture and restoration to his home of slavery. Whether *now* it would be held by the Federal judiciary, that there existed a general right on the part of the master, personally, to reclaim the slave by his own direct force, as bail may recover their prisoner, is doubtful. But granting that such right exists, still there is no right to hold him in slavery in the State to which he has escaped. There is the right of



taking and carrying him away, undoubtedly, either by the process of Federal law, or, perhaps, by this personal authority that belongs to the relation of bail and prisoner, or master and slave; but not to hold him in slavery; and any attempt to do so, or to do anything except with due diligence to remove the escaped slave to the State from which he escaped, would not be protected against our writ of Habeas Corpus by the Federal Constitution or Federal legislation.

Before considering the decisions of the United States courts, which I suppose clearly establish the position that the Federal legislature and the Federal courts have nothing whatever to do with the subject now before this Court, I will, very briefly, place before the Court my views as to the existing law of this State, on the subject of the allowance or permission of slavery within it.

If there is nothing left to be considered but whether our law sustains or permits this relation of master and slave, if this is the kind of legal restraint necessary to defeat of its proper result the writ of Habeas Corpus, then we must find in our State law, in some form, an authority for the restraint.

It is necessary for me, here, only to suggest, that it is not requisite, to support a legal restraint, that there should be a positive warrant or mandate of law directing or requiring it. A restraint *permitted* by our law is as good an answer to the writ of Habeas Corpus as a positive warrant or mandate. It is not necessary that we should have a writ of execution, or a warrant of committal, or that the imprisonment should be in the State prison or in a jail, or that, in any form, there should be a direct command of active authority. The relations that our law recognizes, whether or not they be established or regulated by statute, and which give, in their nature, restraint over the person, to this or that degree, constitute a good answer to uphold the exercise of that

restraint to that degree. The relations of husband and wife, of parent and child, of guardian and ward, of the drunkard and his committee, of the lunatic and his committee; all these relations, when the exigency of the writ evokes them as a cause of the restraint of persons, are recognized by our law as justifications for such restraint and control as do not exceed the due measure which the law allows to them. But, if the Court please, there can be nothing recognized by law as an occasion or justification of restraint, except some general *status* established, allowed, recognized, by our law, or, some positive mandate or warrant. In one or the other form, as matter of positive, actual, recognized existence in our State, an answer must be made to the writ, or the liberty of the subject of it is, at once, secure to him. The answer here does not set up any of the natural relations. Nor does it set up the relation of apprentice and master, or of guardian and ward, or any similar relations, which are not natural but yet are lawful relations. The answer is *slavery*; and not slavery of the State of New York, but slavery of the State of Virginia. It is slavery in Virginia, in transit through New York, continuing here the relation created by the law in Virginia, which it is expected or desired, shall receive the sanction and support of our law, and of this Court, for the special purpose the occasion requires.

But, I maintain, the law of this State does not permit the existence of slavery within its limits. And, first, the *common law* of the State does not permit the existence of slavery within its limits. I now speak of the common law of this State as we understand it, as a system of law governing the relations of persons, and of persons to things in this State, as a body of law discriminated and separated from that which is established by statute. This body of law is derived from England, the source of the common law of this State; and when I say the common law of this State does not permit

slavery within its limits, I fear no contradiction, in the known judicial sense of that law.

Whether or not the institution of slavery within this State—while it existed and was regulated by statute, and was modified also, I have no doubt, by subjecting it, in some degree, to the principles of common right and general justice which lie at the foundation of the common law of the State, and of the nation from which we inherited it—whether or not the institution of slavery in this State was, properly speaking, a part of the common law of this State, seems not to be a very important inquiry. I do not suppose it should be, properly, so considered. I suppose that the whole course of legislation, the whole course of judicial determination, treated the whole system of slavery in this State as foreign—not incorporated into our system, not permitted to be moulded into that relation between master and slave which would have followed from its control by the common law. The cases I have referred to from the English books (and, I take it, they have not been at all shaken by the comments of the learned counsel), the cases show, that, by the common law of England, any such *status* of slavery as it is known in the United States, or as is pleaded here as an answer to the writ, never existed. This is not to be doubted.

Whether, in former times, villenage existed in England, whether it was a monstrously iniquitous oppression, and whether it was inconsistent for British judges to frown upon negro slavery there, in the eighteenth century, because villenage had obtained in earlier times, and whether this inconsistency justly subjects them to my learned friend's derision, may be matter of useful inquiry in some other connection than the present. But the common law of England never knew of this condition of slavery which is pleaded as an answer to the writ of Habeas Corpus, and as legal cause for holding these persons.

The *status* of slavery, therefore, not being established by

the common law of England before the Revolution—and that constitutes our common law—we need to find a positive support for slavery among our population, recognized by the public will of the State, as manifested by legislation, in order to sustain it. If obliged to rest upon the common law, it would have no support whatever.

What may, at earlier periods of our history, have been the condition of our statute law on this subject, comes to be rather an idle inquiry, when we consider the plain and comprehensive terms of the existing statute law of the State. My learned friend has called the attention of the Court—rather by way of parenthesis, however,—to the statute which it is now necessary to look at more distinctly.

The Revised Statutes, being, in the provisions I am now about to read, a re-enactment of the law of 1817, provide as follows: “No person held as a slave shall be imported, introduced, or brought into this State, on any pretence whatever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave who hath been introduced, or brought into the State, contrary to the laws in force at the time, shall be free.” (Section 1.)

“Every person born within this State, whether white or colored, is **FREE**; every person who shall hereafter be born within this State, shall be **FREE**; and every person *brought* into this State as a slave, except as authorized by this title, shall be **FREE**.” (Section 16.)

I cannot think it important gravely to discuss with my learned friend, whether this law, in its proper construction, does proscribe the existence of a slave within this State, and make it a legal impossibility wherever the law has force. He has argued, I know, that, although the Legislature, besides the commercial word “imported,” and besides the word, of Latin origin, “introduced” (which means “brought within”), has also used the words “brought into”—that it has failed to make itself fairly understood, or to accom-

plish the meaning imputed in our construction, *that a slave should not be within this State*. It is said that the true force of these terms is satisfied by the construction, and therefore the true construction of the clause should be, "that no slave shall be incorporated into the population of this State; that no slave shall be brought into it, or imported into it, with the design and purpose that he should become a part of the population of this State." Exactly what that means, exactly what limits to the tolerance or maintenance of slavery in this State, this construction of the statute would impose, it is not easy to say, nor do I care to inquire. I respectfully submit, that the statute is clear, comprehensive, and decisive in its meaning, and in its effect. If the statute has the force of law in this State, there never can be, on any pretence, a person in the condition of slavery within this State, unless some provision of that statute, found between the first and last sections of it which I have read to the Court, gives that right.

Now, we do find certain exceptions made by the statute under consideration, for the allowance of slaves under special circumstances within this State, and among these exceptions the following, being sections six and seven of the title:

"Sec. 6. Any person not being an inhabitant of this State, who shall be travelling to or from, or passing through this State, may bring with him any person lawfully held by him in slavery, and may take such person with him from this State; but the person so held in slavery shall not reside or continue in this State more than nine months, and if such residence be continued beyond that time, such person shall be free."

"Sec. 7. Any person who, or whose family shall reside part of the year in this State, and part of the year in any other State, may remove and bring with him or them, from time to time, any person lawfully held by him in slavery, into this State, and may carry such person with him or them, out of this State."

In 1841, this act was passed:

"The third, fourth, fifth, sixth, and seventh sections of Title 7, Chapter 20, of the first part of the Revised Statutes, are hereby repealed."

This express repeal of the sixth and seventh sections, which I have read from the Revised Statutes, presents in the most distinct and absolute form the determination of the people of this State, that the temporary introduction of slavery by transient visitors should not, under any circumstances, be permitted.

Your Honors will perceive that the question now presented is not at all different from what it would have been, while the sixth and seventh sections, that permitted a temporary residence with the slave, were in force, in the case of a slave attempted to be held after the expiration of the limited term. There was a permission for a specified period of time, and a declaration that if that time were overpassed, the slave should be free. Now no hospitality of any kind, or for a moment, is permitted to the master, with his slave, in any sense of retaining him as a slave.

Let us, then, consider a little more fully whether the Federal laws and Federal decisions leave any doubt as to the complete exemption of the several States from Federal control in this matter. Now, your Honors will perceive that, while we talk of *comity* permitting to strangers from communities with which we are in peace, passing through our State, this or that privilege, and so long as the extent of this comity is determined by our jurisprudence and by our own Statutes—we do control entirely the condition of persons within our State. If judicial determinations, at any time, show greater hospitality to foreign institutions than public sentiment approves, the legislature may limit, or wholly terminate that comity.

But when it is claimed that by a superior and paramount law Mr. and Mrs. Lemmon can make a good answer to the

writ of Habeas Corpus, in this State, that they hold these eight persons in New York as their slaves, until they, in pursuance of their proposed voyage, should take them away,—that they bring and hold their slaves here by paramount law, and that law is found in the Constitution of the United States, the question arises: Where is the limit of that right? I defy the learned counsel for the appellants, if he claims this right under the Constitution of the United States, to fix a limit of any kind, either in time, in circumstance or in the tenure of the slavery here—unless it is to be left to some tribunal to say whether the maintenance of slavery under the circumstances, and for the time claimed, is within some general obligation of respect and regard between the different States of this Union. And this brings the question back to the region of *comity*, and not of right.

There is no stopping place, in my judgment, for the *right* claimed under the Constitution of the United States, short of allowing the continuance and maintenance of slavery just so long as citizens of other States shall choose to reside within this State, without surrendering their character of citizens of other States. Accordingly, the claim now, as I understand it, is that Virginians coming here, can bring their slaves and keep them here as long as they remain Virginians. The claim is one of vast proportions, if it be any claim at all; it has no self-imposed limitations whatever. In nature and substance it is a claim that citizens of each State may carry into other States the institutions of their own State. Now, the exclusion of slavery from the States has been the subject of legislation quite as much in the slave as in the free States. I doubt whether there is a slave State in the Union that has not, at some time, or to some extent, legislated for the exclusion of slaves from its territory, and prescribed, as the direct and immediate consequence of their introduction, that they should become free. Will any one draw a distinction between the right of excluding slaves from a State from the

love of liberty, and excluding them from motives of protection and regard for slavery? If South Carolina, from fear of being over-stocked with slaves, legislates to prevent the introduction of more slaves; and if New York regarding one slave an overstock, legislates to exclude that one, is there any difference as to the *power* of legislation, growing out of the motive and purpose of it? I take it not. Virginia, as early as her emancipation from the dominion of the British crown permitted, in 1778, passed a law prohibiting the introduction of slaves into Virginia, and prefaced it with a preamble that she had been prevented from doing it before then, "by the inhuman exercise of the *veto* of the King of England." That law and its preamble are a good answer, from the State of Virginia, to many of the views now supported, in its name and behalf, by the learned counsel.

Certainly slavery cannot be "just, benign, beneficent, consistent with pure benevolence, and, indeed a positive duty,"—if the exclusion and suppression of the institution had been retarded by an act of authority, which was justly stigmatized as *inhuman*. Certainly we might suspect that slavery itself was inhuman, if the suppression of it was only stopped by an act of inhuman tyranny.

But later legislation, and legislation that has been brought into judicial controversy in the slave States and in the Federal tribunals, has busied itself upon this same subject. The case of *Groves vs. Slaughter* (15 Peters) was considered, and should be considered, and is tenaciously adhered to by the present Chief Justice of the United States, as a decision that the Federal government has no voice or authority on the subject whatever. How did that case arise? The Constitution of Mississippi adopted in 1832, had prohibited the introduction of slaves as merchandise or for sale after the first day of May, 1833. Notwithstanding that provision, there having been no affirmative legislation, defining penalties and affixing consequences to the introduction of slaves



and their sale, the people of Mississippi bought a good many slaves from Kentucky and Tennessee, and other States, and gave their notes for them. When the notes became due, the slaves being in Mississippi, and still held as slaves, the collection of the notes was attempted to be defeated on the ground that the consideration was illegal, because the slaves had been introduced into the State of Mississippi, contrary to the provisions of the Constitution. The State courts of Mississippi held that that was a sound view of the law, and that from the payment of the notes, amounting altogether to some millions of dollars, the people of Mississippi were quite free; that they might keep the slaves and not pay the notes. The question was brought up before the Supreme Court of the United States, in the case of *Groves vs. Slaughter*, argued by Mr. Webster, Mr. Clay, and General Jones, on behalf of the note holders, and by Mr. Gilpin, Attorney-General, and Mr. Walker of Mississippi (since much distinguished in public life), on the other side. A very elaborate discussion was had on one question involved, whether the Constitution of Mississippi, by its own vigor, operated such an illegality in the introduction of slaves, as made the notes void; or whether it was only binding upon the Legislature to pass laws that should prohibit their introduction and should affix such consequences—such as forfeiting the purchase, or making the slave free, or declaring the contract or the security void—as they might see fit. It was claimed on the part of the note holders that this Constitutional provision did not, of itself, without legislation under it, create such an illegality in the contract of sale, as defeated the recovery of the note. They contended, further, that if that consequence did follow, so as to be a matter of forensic importance in the case, the Constitution of Mississippi, which excluded the slaves, was, in this provision *invalid*, under the *Constitution of the United States*; that, under the commercial clause, the Federal Government had exclusive jurisdiction over the regu-

lation of commerce between the States; and if commerce between the States, then of commerce in slaves, as well as in any other property. The proposition, therefore, was, that this clause in the Constitution of Mississippi which excluded slaves from the State as *merchandise* was void, under the Constitution of the United States, in its commercial clause. Well, that case was disposed of by the Federal judiciary holding, as matter of law, that the notes were not avoided by the Constitution of Mississippi, but that legislation was needed to produce that effect. But the Court utterly scouted the notion that the clauses of the Constitution of the United States appealed to, had anything to do with this question of the introduction of slaves into either slave or free States. The opinion of the Court was given by Mr. Justice Thompson, and disposed of the cause, as I have said, on the point that the Constitution of Mississippi did not invalidate the notes. But the magnitude of the question involved in this claim that the commercial power of the Union had any authority over the introduction or determination of any *status* inside of a State, induced the Court to regard it as a matter concerning which they must express the most decisive opinion. And if it be held that the point already decided disposed of the case, and that the further opinions of the judges were unnecessary and superfluous—why it is at least as good an authority as the reasoning of the judges in the Dred Scott case, beyond the point of decision there, and which is so much relied on in this argument.

At page 506, Mr. Justice McLean states the question, "Can the transfer and sale of slaves from one State to another be regulated by Congress, under the commercial power?" I take it for granted that there is much more sense in claiming that, when the introduction of slaves has some connection with commerce, in a proposed sale, you may invoke the commercial power of the Union, than when their introduction is mere matter of convenience of travel. The

learned judge proceeds: "The Constitution treats slaves as persons. By the laws of certain States, slaves are treated as property; and the Constitution of Mississippi prohibits their being brought into that State by citizens of other States, for sale, or as merchandise. Merchandise is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which is properly embraced by a commercial regulation. But if slaves are considered in some of the States as merchandise, that cannot divest them of the leading and controlling qualities of persons, by which they are designated in the Constitution. The character of property is given them by the local law. This law is respected, and all rights under it are protected by the Federal authorities; but the Constitution acts upon slaves as persons, and not as property. . . . The Constitution of the United States operates alike on all the States, and one State has the same power over the subject of slavery as every other State. If it be Constitutional in one State to abolish or prohibit slavery, it cannot be unconstitutional in another, within its discretion to regulate it. . . . The power over slavery belongs to the States respectively. The right to exercise this power by a State is higher and deeper than the Constitution. This involves the prosperity and may endanger the existence of a State. Its power to guard against or to remedy the evil, rests upon the law of self-preservation—a law vital to every community and especially to a sovereign State."

Chief Justice Taney is not at all behind Mr. Justice McLean in his views of the necessary reservation to the States of complete control over this whole subject. He says, at page 508: "In my judgment, the power over this subject is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits from another State, either for sale or for any other purpose; and also to prescribe the manner and mode in which they

may be introduced, and to determine their condition and treatment within their respective territories; and the action of the several States upon this subject cannot be controlled by Congress, either by virtue of its power to regulate commerce or by virtue of any other power conferred by the Constitution of the United States. I do not, however, mean to argue this question. I state my opinion upon it, on account of the interest which a large portion of the Union naturally feel in this matter, and from an apprehension that my silence, when another member of the Court has delivered his opinion, might be misconstrued."

Mr. Justice Story, Mr. Justice Thompson, Mr. Justice Wayne, and Mr. Justice McKinley, concurred in these views of the Chief Justice and of Mr. Justice McLean.

The next case to which I will briefly ask your Honors' attention is that of *Prigg vs. The Commonwealth of Pennsylvania*, in the 16th of Peters, and, especially, to the parts of the case that are referred to in my points. The Court is familiar with the general doctrine of that case. It raised before the Federal Court for decision the question, whether the Constitutional clause which provided for the rendition of fugitives from service, and the legislation under it, made the subject one of exclusive Federal regulation, and whether the statute of the State of Pennsylvania, and of course those of New York and other States, within the same purview, were constitutional. The exclusive authority of Federal Legislation, in the premises, was fully established, and upon general reasons which established equally, that but for the clause in the Constitution, the whole subject, even in respect to escaped slaves, would have been absolutely and exclusively within the control of State authority.

Judge Story, delivering the opinion of the Court, says (speaking of the fugitive slave clause of the Constitution): "The last clause is that, the true interpretation whereof is directly in judgment before us. Historically, it is well known,

that the object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves, as property in every State of the Union into which they might escape from the State where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding States; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

“By the general law of nations, no nation is bound to recognize the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in *Sommersett's case*, Loft's Rep. 1, s. c. 11 “State Trials,” by Harg, 340, s. c., 20 Howell's “State Trials,” 79; which was decided before the American Revolution. It is manifest from this consideration, that if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and endangered perpetual strife between the different States. The clause was, therefore, of the last

importance to the safety and security of the Southern States, and could not have been surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted in the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity."

Again, at pages 622 and 623, he says: "In the first place, it is material to state (what has already been incidentally hinted at) that the right to seize and retake fugitive slaves, and the duty to deliver them up, in whatever State of the Union they may be found, and of course the corresponding power in Congress to use the appropriate means to enforce the right and duty, derive their whole validity and obligation exclusively from the Constitution of the United States, and are there, for the first time, recognized and established in that peculiar character. Before the adoption of the Constitution, no State had any power whatever over the subject, except within its own territorial limits, and could not bind the sovereignty or the legislation of other States. Whenever the right was acknowledged or the duty enforced in any State, it was as a matter of comity and favor, and not as a matter of strict moral, political, or international obligation or duty. Under the Constitution it is recognized as an absolute, positive right and duty, pervading the whole Union with an equal and supreme force, uncontrolled and uncontrollable by State sovereignty or State legislation. It is, therefore, in a just sense a new and positive right, independent of comity, confined to no territorial limits, and bounded by no State institutions or policy."

And, at page 625 he proceeds: "These are some of the reasons, but by no means all, upon which we hold the power of legislation on this subject to be exclusively in Congress. To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood in any manner whatsoever to doubt or to

interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States. It is wholly distinguishable from the right and duty secured by the provision now under consideration, which is exclusively derived from and secured by the Constitution of the United States, and owes its whole efficacy thereto."

These opinions, included in the judgment as pronounced by the Court, were assented to by all the judges who assisted in the actual determination of the case.

The next case is that of *Strader vs. Graham*, in 10th Howard, and was of this kind: Graham was a Kentucky slave-owner, and had permitted some of his slaves to cross over into the State of Ohio, habitually, for the purpose of instruction in music, designing to retain his property in them, and to make this talent, thus to be cultivated, productive to himself. The slaves receiving this instruction returned to their master, and afterward fled from his service, making their escape by means of a steamboat on the Ohio River. By the law of Kentucky, in the protection of slave property against such casualties as this, the proprietors of any steamboat or other vessel upon the river, by means of which the escape should be made, are made responsible to the slave-owners in an action for the value of the slave. An action was brought, under this law, by Graham, against the owners of the boat, upon which the escape had been made, in equity to enforce a lien, given by the statute, against the boat. The litigation, commenced in the State Court of Kentucky, terminated in a final judgment in the Court of last resort, in favor of the slave-owner. From that decision an appeal was taken under the 25th section of the Federal Judiciary act, to the Supreme Court of the United States, the defence in the Court below being on the ground, in part at least as a good and sufficient one, that these slaves had become free

by their master's voluntary introduction of them into the State of Ohio, and that the state of slavery thus dissolved was incapable of reinstatement. The 25th section, as your Honors know, carries up cases from the courts of last resort in the States, when the decision is alleged to have involved the consideration of a right secured under the Constitution of the United States, and has resulted in a decision adverse to that right.

The appellants in that case, on the question of freedom or slavery, and the considerations it involved, stood precisely, to illustrate the matter, as these appellants now before the Court would stand in the Supreme Court of the United States, if your Honors' judgment here should affirm the judgment of the Court below, and an appeal should be prosecuted from your judgment to the Supreme Court of the United States, upon the ground that the right, to which your decision had been adverse, was protected by the Federal Constitution.

Now, the first and important question in all cases that are carried into the Federal Judiciary by that method of appeal is, whether the Appellate Court has jurisdiction of the cause. In other words, whether the judgment below does contain an adjudication upon any right under the Constitution of the United States, and whether the determination has been adverse to the right claimed, for both these elements must be found in the decision of the Court of last resort of the State, or there is no appeal to the Supreme Court of the United States to reverse the judgment, although it may be clearly erroneous. The direct point, therefore, of Federal control over the civil *status* of persons within the States, was raised in the case of *Strader vs. Graham*, as a question of *jurisdiction*.

Chief Justice Taney, in delivering the opinion of the Court, says: "The Louisville Chancery Court finally decided, that the negroes in question were his slaves, and that



he was entitled to recover \$3,000 for his damages. And if that sum was not paid by a certain day specified in the decree, it directed that the steamboat should be sold for the purpose of raising it, together with the costs of suit. This decree was afterward affirmed in the Court of Appeals in Kentucky, and the case is brought here by writ of error upon that judgment.

"Much of the argument on the part of the plaintiffs in error has been offered for the purpose of showing that the judgment of the State Court was erroneous in deciding that these negroes were slaves. And it insisted that their previous employment in Ohio had made them free when they returned to Kentucky.

"But this question is not before us. Every State has an undoubted right to determine the *status*, or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the States in this respect are restrained, or duties and obligations are imposed upon them by the Constitution of the United States, and there is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another State should or should not make them free on their return. The Court of Appeals have determined, that by the laws of the State they continue to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it."

A comparison of this case with the Dred Scott decision, and with the narrative of the litigation concerning Dred Scott, as given in the report of that decision, will exhibit to the Court the reason, as I suppose, that the Dred Scott con-

troverſy was not brought into the Supreme Court of the United States, by appeal from the judgment of the Court of Miſſouri.

The litigation concerning the liberty of Dred Scott, generally conſidered to have been a caſe made up for the purpoſe of raising certain queſtions for judicial determination, ſtarted in the Courts of the State of Miſſouri, and had reached final judgment in the laſt Court of that State, adverſe to the liberty of Scott. Scott claimed his liberty by virtue of the Conſtitution of the United States, juſt as the freedom of Kentucky negroes was claimed under the Conſtitution of the United States. Pending this litigation in the Miſſouri caſe, the deciſion was made in the caſe of *Strader vs. Graham*, diſmiſſing the appeal under the 25th ſection for want of juriſdiction. As this abſolutely ſhut out any conſideration of the rights or doctrines on which the freedom of Scott was ſuppoſed to have been gained, an abandonment of the litigation in the State Courts of Miſſouri followed, and a new litigation by Scott, in the Federal Court, was commenced, whereby, through regular and general appeals from the Circuit Court to the Supreme Court of the United States, the whole cauſe was brought up, and the Court found itſelf, as it thought, at liberty to deliberate upon ſome matters of grave and general import, political and ethical, after they had diſpoſed of the inquiry as to the freedom of Dred Scott.

The caſe *Ex parte Simmons* (4 Waſh. C. C. R. 396), to which I have referred your Honors, ſeems a direct authority upon the queſtion before us.

There the queſtion was, as to the freedom of a ſlave, brought voluntarily by his maſter into the State of Pennſylvania, during the prevalence of laws there which permitted the temporary reſidence of a maſter with his ſlave within the juriſdiction of that State. The period allowed by the ſtatute being overpaſſed, the point was whether the ſlave

was entitled to his liberty, and Judge Washington decided that he was.

I come now, if the Court please, to the decision in the *Dred Scott Case*, the general doctrines of which are invoked by the appellants here, as appears by the brief, though not insisted upon orally in the argument, and my learned friend has not called the attention of the Court to the particular principles laid down in the case, upon which his reliance was based. The general character of that case, and the exact limit of judicial inquiry, that its facts presented, have been already fully stated by my learned associate. An examination of the opinion of Judge Nelson in that case will show that he has confined himself to the precise inquiry that the litigation properly presented for judicial determination, to wit, whether Dred Scott was, in Missouri, and by its law, a *slave*.

If he was a *slave*, it must be universally conceded that he was not a *citizen*. As the jurisdiction in question, of the Federal judiciary is confined to suits between *citizens* of different States, the moment you put the plaintiff in the condition of not being a citizen of any State, of having no citizenship, and no civil rights whatever, of course there is no jurisdiction, as the plaintiff's standing in Court rest, not upon personality, but upon citizenship.

But the Court after deciding this, did, through many of their judges, express opinions upon, and elaborately argue, two very important general principles, one of a political nature, and the other coming within the larger range of general ethics and morality. One of these points was, that the restrictive clause of the Missouri Compromise act was unconstitutional and void. There was an opportunity for discussion, though none for decision, on that point, by reason of this fact. Although the question of Dred Scott's freedom was fairly presented by a two years' residence with his master in the State of Illinois—a residence, with the effect of which

the validity or invalidity of the Missouri Compromise act had nothing to do—yet, as the question of the freedom of his children and of his wife was also involved in the case, their residence, upon which their claim of liberty rested, happened to be within the portion of the Missouri territory secured to freedom by the restriction of the Missouri Compromise act, subject, of course, to its constitutional validity. The other point of inquiry was purely historical and ethical, and resulted in a very brief and summary deduction by the learned Chief Justice, from the judicial and general annals of the country, that the black men have no rights “that white men are bound to respect.” Now both these topics are without any application to the real inquiry before this Court, and I have no occasion to refer to the Dred Scott decision, as a determination or discussion of the *status* of slavery in the territories of the United States.

That subject is to be considered, either legislatively or judicially, where it may properly arise. But I understand the *principles* announced in the opinions of the judges who concur in the judgment of the Court in the Dred Scott case, to establish, in the fullest manner, the entire control of State authority over the condition of all people within it, and to re-affirm the decisions of the Supreme Court, to which I have called your Honors’ attention.

Thus, the Chief Justice, delivering the opinion of the Court, says: “But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery, by being brought back to Missouri.

“Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this Court, upon much consideration, in the case of *Strader et*

*al. vs. Graham*, reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterward brought back to Kentucky. And this Court held that their *status* or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this Court had no jurisdiction to revise the judgment of a State Court upon its own laws. This was the point directly before the Court, and the decision that this Court had not jurisdiction turned on it, as will be seen by the report of the case.

“So in this case, as Scott was a slave when taken into the State of Illinois by his owner, and there held as such, and brought back in that character, his *status*, as free or slave, depended upon the laws of Missouri, and not of Illinois.

“It has, however, been urged in the argument, that by the laws of Missouri he was free on his return, and that this case, therefore, cannot be governed by the case of *Strader vs. Graham*, where it appeared by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may at one time have been entertained on this subject, we are satisfied upon a careful examination of all the cases decided in the State Courts of Missouri referred to, that it is now firmly settled by the decisions of the highest Court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen.

“Moreover, the plaintiff, it appears, brought a similar action against the defendant in the State Court of Missouri, claiming the freedom of himself and his family upon the same grounds and the same evidence upon which he relies in the case before the Court.

"The case was carried before the Supreme Court of the State; was fully argued there; and that Court decided that neither the plaintiff nor his family were entitled to freedom, and were still the slaves of the defendant; and reversed the judgment of the inferior State Court, which had given a different decision.

"If the plaintiff supposed that this judgment of the State Court was erroneous, and that this Court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this Court, was by writ of error directed to the Supreme Court of the State, requiring it to transmit the record to this Court. If this had been done, it is too plain for argument that the writ must have been dismissed for want of jurisdiction in this Court. The case of *Strader and others vs. Graham*, is directly in point; and, indeed, independent of any decision, the language of the 25th section of the act of 1789 is too clear and precise to admit of controversy."

Is it not entirely clear that the same principles of reasoning and construction apply to this case, now before your Honors, and that your judgment is not the subject of appeal to the Supreme Court of the United States?

Mr. Justice Nelson, on the same point, says: "This question has been examined in the Courts of several of the slave-holding States, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is, that the question is one which belongs to each State to decide for itself, either by its legislature or courts of justice; and hence, in respect to the case before us, to the State of Missouri—a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the Federal courts to follow.

"In other words, except in cases where the power is restrained by the Constitution of the United States, the

law of the State is supreme over the subject of slavery within its jurisdiction.

"As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery, and prohibiting its introduction into their territories.

"Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of this Union; sovereign not merely as respects the Federal Government—except as they have consented to its limitation—but sovereign as respects each other. Whether, therefore, the State of Missouri will recognize or give effect to the laws of Illinois within her territories on the subject of slavery, is a question for her to determine. Nor is there any constitutional power in this government that can rightfully control her."

Now, certainly, if this be good law in favor of slavery, it is good law in favor of liberty. The *status*, slave or free, is the same *status* for consideration and determination, whether the judgment be in favor of slavery, or in favor of liberty. And when, in behalf of the free State of Illinois, it is claimed that it so changes the *status* of any slave, who may come within its borders, that thereafter nothing but positive re-enslavement can deprive him of his condition of freedom, and the judgment is, that Missouri must determine that for itself; when Virginia claims that slaves held lawfully, within its limits, may still retain that condition in the State of New York, must not the decision be that New York must determine that for itself, by its own inherent sovereignty, uncontrolled by the Federal Constitution, and that the Supreme Court at Washington has no jurisdiction to reverse the judgment of this high tribunal?

I read now from the Opinion of Mr. Justice Campbell:

“The principles which this Court has pronounced condemn the pretension then made on behalf of the legislative department. In *Groves vs. Slaughter* (15 Pet.), the Chief Justice said: ‘The power over this subject is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits.’ Justice McLean said: ‘The Constitution of the United States operates alike in all the States, and one State has the same power over the subject of slavery as every other State.’ In *Pollard’s Lessee vs. Hagan* (3 How. 212), the Court says: ‘The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the Court denies the faculty of the Federal Government to add to its powers by treaty or compact.’”

So much for the Dred Scott decision, and the opinions of the learned Judges who concurred in the judgment then pronounced. I have cited passages from their opinions above; the whole tenor of the dissenting opinions of Mr. Justice McLean and Mr. Justice Curtis of course carrying these principles to even further results.

The passenger case, the *State of New York vs. Miln* (in the 11th of Peters) will be found fully to sustain these views. The later passenger cases, which fill a great part of the 7th of Howard, are much relied upon by the learned counsel for the appellants, and references to them are largely spread upon his points, with the view of showing that this introduction of persons into the States, does, in some sort, fall within the commercial power of Congress, and that the doctrine of these cases, which held invalid the Law of New York, and the similar Law of Massachusetts, imposing a tax upon the introduction of passengers into those States re-



spectively, has a bearing upon the question at bar. Those cases were decided by a Court, as nearly divided as a Court of an uneven number can be—five Judges holding the statutes to be unconstitutional, but solely upon the ground that they were, in effect and form, a tax upon commerce. The five Judges who concurred in the opinion were Justices McLean, Catron, McKinley, Wayne, and Grier. Those who dissented were the Chief Justice and Justices Nelson, Woodbury, and Daniel.

But your Honors will perceive that the majority of the Court was made by the adhesion of Justice McLean to the decision. The Chief Justice manfully contended that the decision in *Groves vs. Slaughter* had foreclosed the Court from considering any question, even as a question of taxation, touching the regulation or prevention of the introduction of any persons into the States, this being a most sensitive point with the slaveholding States. Mr. Justice McLean, however, joined in the opinion that it was a tax upon commerce, and, in that light alone, regarded the State laws as an unconstitutional interference with the commercial power of Congress. The criticism which I have made upon the composition of the majority of the Court in the instance of Justice McLean, will apply to Justice Wayne and the other members of the Court from the slaveholding States, who never have been doubtful in their opinions or judgments upon this exclusive control, by the Slave States, of the whole subject of slavery.

A reference to the opinions of the majority of the Court in these cases will show, that it is solely as taxation upon commerce, imposed upon a vessel as it arrives, with its freight of passengers on board, that interference with the commercial power of the Federal Constitution can be rightfully charged upon the State legislation then brought in question. Your Honors are aware that the modification of our passenger laws, made in consequence of the decisions I have cited,

have accomplished, in effect, and in result, substantially the same security and indemnity to this State, against the introduction of burdensome emigrants, as the obnoxious laws produced.

The method now taken exacts a bond that each passenger shall not become chargeable upon the State, and then, by a general provision, permits in lieu of this bond a moderate commutation in money. The Chief Justice in his dissenting opinion in these cases, reiterates his opinions so plainly and decisively expressed in the cases which I have cited.

The Chief Justice says: "The first inquiry is, whether, under the Constitution of the United States, the Federal Government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or the pleasure of the United States to admit. In my judgment, the question lies at the foundation of the controversy in this case. I do not mean to say that the General Government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. I think there is no treaty or act of Congress which can be justly so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the States are bound to submit to it. For if the people of the several States of the Union reserved to themselves the power of expelling from their borders any person or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this Court could neither recognize nor enforce.

"I had supposed this question not now open to dispute.

It was distinctly decided in *Holmes vs. Jemison* (14 Pet. 540); in *Groves vs. Slaughter* (15 Pet. 449); and in *Prigg vs. The Commonwealth of Pennsylvania* (16 Peters, 539).

"If these cases are to stand, the right of the States is undoubted.

"If the State has the power to determine whether the persons objected to shall remain in the State in association with its citizens, it must, as an incident inseparably connected with it, have the right also to determine who shall enter. Indeed, in the case of *Groves vs. Slaughter*, the Mississippi Constitution prohibited the entry of the objectionable persons, and the opinions of the Court throughout treat the exercise of this power as being the same with that of expelling them after they have entered.

"Neither can this be a concurrent power, and whether it belongs to the General or to the State Government, the sovereignty which possesses the right must in its exercise be altogether independent of the other. If the United States have the power, then any legislation by the State in conflict with a treaty or act of Congress would be void. And if the States possess it, then any act on the subject by the General Government, in conflict with the State law, would also be void, and this Court bound to disregard it. It must be paramount and absolute in the sovereignty which possesses it. A concurrent and equal power in the United States and the States as to who should and who should not be permitted to reside in a State, would be a direct conflict of powers repugnant to each other, continually thwarting and defeating its exercise by either, and could result in nothing but disorder and confusion.

"I think it, therefore, to be very clear, both upon principle and the authority of adjudged cases, that the several States have a right to remove from among their people, and to prevent from entering the State, any person, or class or description of persons, whom it may deem dangerous or in-

jurious to the interest and welfare of its citizens; and that the State has the exclusive right to determine, in its sound discretion, whether the danger does or does not exist, free from the control of the General Government."

This review of the judgments of the Federal Court shows, that in whatever points the judgment and doctrines of the Supreme Court of the United States, as recently promulgated, may be supposed to be unfavorable to personal liberty, they cannot be charged with being at all inconsiderate of the vital and essential point, that within the States the civil and social condition of all persons is exclusively governed by State authority, excepting only in the precise case of a fugitive from labor. In that case the inquiry arises not under the commercial clause, nor under the privilege and immunity clause, but under the express clause applicable, in terms, to the subject.

Before passing from this topic, I ought, perhaps, to notice one suggestion in regard to the construction of this privilege and immunity clause, that to give its apparent and natural meaning involves an absurdity. It is said for a citizen of Virginia to claim, by virtue of that clause, in the State of New York, the full privileges of a citizen of New York, would include the *political* rights of a citizen in the government of the State. The very statement of this difficulty refutes it. The clause confers or secures no privileges or immunities, except so long as the sojourner remains a citizen of the State whence he comes. Its operation ceases the moment the citizenship of the State into which he has come is assumed. It cannot, therefore, clothe the sojourner with rights, the exercise of which transmutes him, by the mere act, into a citizen of the new State, and, by the same act, divests him of his original citizenship. No one can be a citizen of two independent sovereignties at the same time. The required limitation is found in the terms used, and in the nature of the subject to which they are applied.

I now beg to ask the attention of the Court to some cases in the Virginia reports of much interest on this subject, of the power of a sovereign State over the *status* of slavery within it, and of the limitation of the condition of slavery to that form and extent alone, in which it is supported by the positive law of the State. The case of *Butt vs. Rachel*, found in 4 Munford's Reports, page 209, was decided in 1813, in the Court of Appeals of Virginia. The case did not arise under the Constitution of the United States, but affirms the general doctrine, that no State, even if it has a *status* of slavery within it, and recognizes such condition in its population as lawful and politic, by comity, recognizes the lawfulness within its borders of any other than that very slavery which its own law creates and upholds. The note of the case is as follows:

"A native American brought into Virginia since the year 1691, could not lawfully be held in slavery here; notwithstanding such Indian was a slave in the country from which he or she was brought."

Now, this slave introduced into Virginia, and concerning whose *status* this litigation was raised, was brought from the island of Jamaica, and was lawfully there a slave in the hands of his master. The master coming into Virginia with the slave, claimed the right of holding him in slavery there. Your Honors will not fail to notice how differently Virginia stood in relation to this subject of slavery, from the State of New York. Virginia did not proscribe the enslavement of Indians as an unlawful source of slavery; on the contrary, as your Honors have been informed by the learned counsel for the appellants, the comprehension of slavery in Virginia embraced the native tribes; many of their number became slaves, and now, their descendants form a portion of the slave population of Virginia.

But, in 1691, the colonial government of Virginia passed a law, not, in terms, abolishing the system of Indian slavery,

but a law permitting free trade with the Indians. This statute was immediately seized upon by the Courts of Justice of Virginia, as involving the necessary legal intendment, that the enslavement of these people, that were thus recognized as lawful parties to commercial intercourse, was unlawful, such recognition being inconsistent with the absolute denial of personal rights, which lay at the foundation of slavery.

Here, then, was a question of the hospitality of the laws and policy of Virginia, a slaveholding community, to this condition, in the person of a slave brought within it from another slaveholding community. Certainly none of the reasons for aversion to, and proscription of, slavery, *per se*, could very well apply, on the part of Virginia, against permitting this imported slave of Indian origin to continue a slave in Virginia.

But what was the question? It was, whether there was any positive municipal law of Virginia, whereby such a *status* of slavery could be affirmatively maintained, in respect of such a person, and the Court decided that there was not, and that this man, a slave in Jamaica, was free in Virginia. No slaves but her own could breathe the air of Virginia! The application may seem strange; nevertheless, upon the soundest principles of jurisprudence, of the slave, as well as of the free, States, the judgment was correct.

The cause was argued by Mr. Wickham and Mr. Wirt, two of the ablest lawyers which our country has produced. Mr. Wirt, arguing for the freedom of the alleged slave, says: "Since 1691 no Indian could be *held* in bondage. I do not contend merely that Indians could not be *reduced* into slavery, but they could not be *held* as slaves. This was the plain consequence of 'free and open trade with all Indians whatsoever, at all times and in all places.' It was not conferring any boon upon them, but merely acknowledging the rights which God and nature gave."

Mr. Wickham in answer seems to have recognized fully the general rules of jurisprudence for which I have occasion to contend. He says: "Mr. Wirt contends that Indians are, *naturally*, entitled to freedom. So are negroes; but this does not prevent their being slaves. I admit the right to make them slaves must depend on positive institution. What I contend for is, that all persons to whom the general provisions of our slave laws apply, may be slaves here, provided they were slaves by the laws of the country from which they were brought hither."

In the 2nd of Henning and Munford, in a case decided in 1808, the same question arose and was thus disposed of in the judgment of the Court. "No native American Indian brought into Virginia since the year 1691, could, under any circumstances, be lawfully made a slave."

The remaining consideration, if the Court please, to which I shall ask your attention, and which will require from me some brief illustration, concerns the law of nature and of nations, as bearing upon the doctrine of *comity*. For, after all, a support for this hospitality to slavery must be looked for from some other source than in the Constitution or laws of the United States, or in the decisions of the Supreme Court of the United States. No appeal can be addressed to this Court, on which to rest their judicial toleration of slavery, except, first, that the State by its authentic positive legislation has not proscribed and prohibited the temporary allowance of this condition within our territory; or, second, that nothing in the public and general law, or in the customs or institutions of this State, has this effect.

This brings me to the third point of my brief, to which I respectfully ask the attention of the Court.

The citation from Story's "Conflict of Laws" is to the effect that the whole judicial inquiry open to any court is simply, whether in the laws and institutions, social and

civil, of the State can be found any such principles as make it possible or proper, that the rights claimed to be exercised during their stay within the State, by transient or other residents, not subjects or citizens, should be permitted. If the Court find no positive, clear, certain, and explicit expression of the public will through the authentic organs of its manifestation, it may then explore the regions of general jurisprudence and social ethics, to determine whether the desired comity can be extended, without injury to the policy of the State. The reference to Vattel, under the same point gives the view of that eminent publicist upon the *moral personality* of a political society. He says, "Nations or States are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their combined strength. Such a society has her affairs and her interests; she deliberates and takes resolutions in common, thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of *obligations* and rights."

Your inquiry then is, whether this *moral person*, the State of New York, having an understanding and will of its own, after deliberation, and taking resolutions, has or has not thought fit to manifest hostility to the institution of slavery.

The learned counsel for the State of Virginia says, that the resolution of 1857, passed by the legislature of this State, is not to be taken into account in determining the rights of these parties, or the policy and purpose of the State of New York on the subject of slavery. Well, as far as I can see, this resolution does not really go beyond the scope and effect of the legislation of 1830, as modified by the amendment of 1841, to which I have called the attention of the Court.

This resolution is certainly very moderate in its phrase, to have drawn upon it so severe an epithet from the learned counsel in his points, as to characterize it as "*a treasonable*



*resolution*"; a phrase which, when used otherwise than in the newspapers, or at the hustings, may be supposed to have some definite moral, if not legal, force.

This resolution is simply to this effect: that slavery shall not be allowed within our borders, in any form, or under any pretense, or for any time, however short. The second section of the act of 1830 expressly provides, that nothing in the first section thereof (the section prohibiting slavery already quoted), shall be deemed "to discharge from service any person held in slavery, in any State of the United States, under the laws thereof, who shall escape into this State." This, certainly, is a loyal and respectful recognition of the binding obligation of the Federal Constitution in respect to the rendition of fugitive slaves. In this state of our law, where is the *treason* in the resolution of 1857? How can there be treason without traitors? Who are the traitors? Is this a bold figure of speech, or does the learned counsel, speaking as the representative, here, of the State of Virginia, mean to be understood as imputing *treason* in act, or word, or thought, to the honorable senators and representatives who joined in that legislative resolution? Is it just, is it suitable to charge a law, or a resolution of this State, with being treasonable, because it does not accord with the learned counsel's construction of the meaning and effect of the Federal Constitution?

Were the laws, by which we taxed passengers, treasonable laws, because the Supreme Court of the United States held that they were unconstitutional? Is a resolution which, only by a most extravagant construction, can, in its own terms, be tortured into a conflict with the fugitive slave clause of the Constitution of the United States, and when there stands upon our statute book an express exception of the case covered by that clause—is such a resolution to be charged with treason? I take it not, and that the epithet can only be excused as an unguarded expression.

But we say, that if the statute cited has not the construction which we claim for it, and if the resolution of 1857, so far as the case at bar is concerned, cannot be regarded as indicating to this Court what the disposition of this State in respect to slavery is, we say, without and aside from such manifest enactment of the sovereign will in the premises, as matter of general reason and universal authority, the *status* of slavery is never upheld in the case of strangers, resident or in transit, when and where the domestic laws reject and suppress such *status*, as a civil condition or social relation.

The same reasons of justice and policy which forbid the sanction of law and the aid of public force to the proscribed *status* among our own population, forbid them in the case of strangers within our own territory.

The *status* of slavery is not a natural relation, but is contrary to nature, and at every moment it subsists it is an ever new and active violation of the law of nature.

Citations from the "Law of Nature," I am aware, are open to the objection of vagueness and impossibility of verification, and a grave English judge is said once to have discomfited a rhetorical advocate, who appealed frequently to the "book of nature" for his authority, by asking for the volume and page. I am fortunate in my present appeal to the "law of nature," in finding a literal and written statement of its proscription of slavery in a document, of which I make profert, and of whose "absolute verity," as a record, the counsel for the State of Virginia can hardly make question; I mean, to be sure, the Constitution of the State of Virginia. It is true the portion of this instrument, which I shall read, labors under the double opprobrium of having been originally written when men's minds were inflamed with the love of liberty, at the period of 1776, and of bearing the impress of the same pen which drafted the great charter of our national existence, the Declaration of In-

dependence. But the force of these aspersions upon its credit, let us hope, is somewhat broken by its *readoption* in 1829 and again so late as 1851.

In the Bill of Rights of the Constitution of Virginia, and as its first article we find it thus written: "1. That all men are, *by nature*, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

I may be permitted to observe, in passing, that I find in this Virginia "Bill of Rights," a most distinct statement of the doctrine I have asserted, as to the absolute and exclusive supremacy of its own laws in every State. The text reads as follows: "14. That the people have the right of uniform government; and therefore that no government separate from, or independent of, the Government of Virginia, ought to be erected or established within the limits thereof."

That, I take it, means that the laws or customs of no other State are to control the *status* of any person in Virginia, for any length of time, or under any circumstances, but *uniformity* must prevail in the laws and in their administration.

I find, too, in this instrument the best evidence, that the statesmen of Virginia felt no such contempt for "general principles" and their practical influence in the conduct of society, in the framing of government, the enacting and administration of laws, as her learned counsel, here, has made so prominent. The Virginians were always doctrinarians, and liked to see things squarely set forth in black and white. The "Bill of Rights" thus teaches the true basis of freedom and the best hopes for its security. "15. That no free government, or the blessing of liberty, can be preserved to any people, but by a firm adherence to justice, moderation,

temperance, frugality and virtue, and by a frequent recurrence to fundamental principles."

But to return to the argument: In dealing with this question of *comity*, we must look with some definiteness at this institution of slavery which seeks, however transiently and casually, the tolerance of our society, the support of our law. We must look slavery square in the face. Certainly, no man could be braver than the learned counsel in the moral, social, juridical, and legal principles which he avows. Yet, I notice that, upon his points, and in his speech, he a little prefers to glide off from the name "slaves" to that of "servants," and from "slavery" to "pupilage."

Now, if we are to determine whether it consists with the spirit of our institutions, with the purity of our justice, to tolerate and enforce, at all, the system of slavery, let us see what it is.

We all agree, I suppose, that slavery, that is, chattel slavery, the institution in question, finds neither origin nor home in any nation, or in any system of jurisprudence, governed by the common law. Among barbarous nations, without law or system, slavery exists, and is maintained by mere force. Among civilized nations it is the creature of the *civil law*. From an elementary book of acknowledged authority, Taylor's "Elements of the Civil Law" (page 429), I beg to read a concise view of the characteristic traits of this institution. "Slaves were held *pro nullis, pro mortuis, pro quadrupedibus*." That is to say they were looked upon as *no persons*; as those in whom human personality was *dead*; as *beasts*. "They had no head in the State, no name, title or register; they were not capable of being injured; nor could they take by purchase or descent; they had no heirs and therefore could make no will; exclusive of what was called their *peculium*, whatever they acquired was their master's; they could not plead, nor be pleaded for, but were excluded from all civil concerns whatever; they could not

claim the indulgence of absence *reipublicae causa*; they were not entitled to the rights and considerations of matrimony, and, therefore, had no relief in case of adultery; nor were they proper objects of cognation or affinity, but of *quasi cognation* only; they could be sold, transferred or pawned as goods or personal estate, for goods they were and as such they were esteemed."

The laws of the slaveholding States, while they concur in degrading slaves from persons into things, differ in the rules of conveyance and of succession pertaining to them as property. In Louisiana and in Kentucky they are governed, in these respects, by the rules pertaining to *real estate*. In most, if not all, of the other States, they are, in all respects, chattels; as, for instance, in South Carolina, where the law declares, "Slaves shall be deemed, sold, taken, reputed, and adjudged in law to be *chattels personal* in the hands of their owners and possessors, and their executors, administrators and assigns, to all intents, constructions and purposes whatsoever."

(2 Brev. Dig. 229. Prince's Dig. 446. Thompson's 183.)

Such, then, is *slavery*, the *status* now under consideration. Such it continues to be, in all essential traits, while it preserves its identity. It needs positive statutes to relieve it materially from any of these odious traits, to raise the slave into any other condition than that of being *no person*.

When, therefore, we say that slavery is "just, benign and beneficent," if we have due regard to the appropriate use of words, we mean that that condition, that relation of man to man, is "just, benign and beneficent."

Horrible it is, says the learned counsel, if it be maintained between men of the same race—lamentable, if it be maintained toward men like the Indian, for whom some sentiment may be exhibited; but it is "just, benign and beneficent," if applied to the negro.

This is the condition of slavery, concerning whose tolerance within this State your Honors are to determine, whether the system and order of society in this State permit you, as judges and magistrates to entertain, to maintain, to enforce it. I know of no reported case, in which this true character of slavery, in its just, legal lineaments, is more fairly and candidly considered, in a Slave State, or in a Free State, than in the case of *The State vs. Mann*, 2d Devereux's Reports, page 268.

The Supreme Court of North Carolina there gives a very careful and deliberate judgment, upon the essential relations between master and slave as established by their laws, as a matter of judicial limitation, and recognition. In delivering the opinion, Judge Ruffin, one of the ablest judges of that State, or of this country, was obliged to say what the nature of slavery was, in respect to the right of the master, and the subjection of the slave. How this case arose and how necessary it was to meet the questions discussed, the Court will perceive from the very brief narrative which prefaces the case.

"The defendant was indicted for an assault and battery upon Lydia, the slave of one Elizabeth Jones. On the trial it appeared that the defendant had hired the slave for a year—that during the term the slave had committed some small offence, for which the defendant undertook to chastise her—that while in the act of so doing, the slave ran off, whereupon the defendant called upon her to stop, which being refused, he shot at and wounded her.

"His Honor, Judge Daniel, charged the jury, that if they believed the punishment inflicted by the defendant was cruel and unwarrantable, and disproportionate to the offence committed by the slave, that in law the defendant was guilty, as he had only a special property in the slave. A verdict was returned for the State, and the defendant appealed."

Ruffin, Judge. "A judge cannot but lament, when such cases as the present are brought into judgment.

"It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own exist, and are thoroughly understood. The struggle, too, in the judge's own breast, between the feelings of the man and the duty of the magistrate, is a severe one, presenting strong temptation to put aside such questions if it be possible. It is useless however to complain of things inherent in our political state. And it is criminal in a court to avoid any responsibility which the laws impose. With whatever reluctance therefore it is done, the Court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina.

"The indictment charges a battery upon Lydia, a slave of Elizabeth Jones. Upon the face of the indictment, the case is the same as the *State vs. Hale*, 2d Hawks, 582. No fault is found with the rule then adopted; nor would be, if it were now open. But it is not open; for the question, as it relates to a battery on a slave by a stranger, is considered as settled by that case. But the evidence makes this a different case. Here a slave had been *hired* by the defendant, and was in his possession, and the battery was committed during the period of hiring.

"With the liabilities of the hirer to the general owner for an injury permanently impairing the value of the slave, no rule now laid down is intended to interfere. That is left upon the general doctrine of bailment.

"The query here is, whether a cruel and unreasonable battery on a slave, by the hirer, is indictable. The judge below instructed the jury that it is.

"Upon the general question, whether the owner is answerable, *criminaliter*, for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute, he Court entertains but little doubt. That he is so liable

has never yet been decided; nor, as far as is known, been hitherto contended. There have been no prosecutions of the sort. The established habit and uniform custom of the country in this respect is the best evidence of the portion of power, deemed by the whole community requisite to the preservation of the master's dominion. If we thought differently, we could not set our notions in array against the judgment of everybody else, and say that this or that authority may be safely lopped off. This has indeed been assimilated at the bar to the other domestic relations, and arguments drawn from the well established principles which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice, have been pressed on us. The Court does not recognize their application. There is no likeness between the cases. They are in opposition to each other, and there is an impassable gulf between them. The difference is that which exists between freedom and slavery, and a greater cannot be imagined. In the one, the end in view is the happiness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness, in a station which he is afterward to assume among freemen. To such an end, and with such an object, moral and intellectual instruction seem the natural means; and for the most part they are found to suffice. Moderate force is superadded only to make the others effectual. If that fail, it is better to leave the party to his own headstrong passions and the ultimate correction of the law, than to allow it to be immoderately inflicted by a private person. With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed, in his own person and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a



being, to convince him of what it is impossible but that the most stupid must feel and know can never be true—that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness. Such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition; I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave.

“That there may be particular instances of cruelty and barbarity, where in conscience the law might properly interfere, is most probable. The difficulty is to determine where a court may properly begin. Merely in the abstract it may well be asked, which power of the master accords with right. The answer will probably sweep away all of them. But we cannot look at the master in that light. The truth is, that we are forbidden to enter upon a chain of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man, at least, if not by the laws of God.

“I repeat that I would gladly have avoided this ungrateful

question. But being brought to it, the Court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be the imperative duty of the judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute. And this we do upon the ground, that this dominion is essential to the value of slaves as property, to the security of the master and the public tranquility, greatly dependent upon their subordination, and in fine, as most effectually securing the general protection and comfort of the slaves themselves.

*"Per Curiam.* Let the judgment below be reversed and judgment entered for the defendant."

Now, this is a very gloomy view of slavery. It is however the only view that is permissible of this institution, as a matter of legal power and legal subjection between the parties to it, and it comes precisely to this, that the *slave*, before the law, has *no rights at all*, no more than any mere thing, that, by the law of nature, is subject to the dominion of man. If, indeed, the slave be cruelly injured, as matter of his master's property, then an action for damages will lie, governed, as the Court says, by the "law of bailment." If the State as matter of public policy, chooses to make acts committed in respect to the slave, criminal, it may do so, just as it may acts of malicious mischief in respect of an inanimate substance; as it may protect trees planted in the highway against depredation or injury, or as it may protect public grounds from intrusion or defilement. In such cases an indictment under the statute will lie, because the State has so declared. But there is no recognition or comprehension of the slave, *as respects rights or remedies for himself*, within any of the moral, social and human relations that govern duties or rights between person and person. When, therefore, we are asked to be hospitable in feeling, in

speech, or in law, to slavery we must take it as it is, and with the traits which are inseparable from it, and which, as the Court, in the case cited, say, cannot be abrogated without destroying the relation between master and slave, for they exist in the relation itself.

Now, I say, that all history and all jurisprudence show that *slavery* originated in the mere predominance of physical force of one man over another. That, I take it, must be conceded. It is equally indisputable that it is continued by mere predominance of physical force, or of social force, in the shape of municipal law. Whenever this force fails at any stage, then the *status* falls, for it has nothing to rest upon. When the stranger comes within our territory, and seeks to retain in slavery a person that he claims to be subject to his dominion, he must either rely upon his own *personal* force, or he must appeal to some *municipal law*, which sustains that relation by the pressure of *its* force. When such a claim is made in this State, our answer is that he has brought with him no system of municipal law, to be a weapon and a shield to this *status*, and he finds no such system here. Where does he find it? We have no such system. We know of no such relations. His appeal to force against nature, to law against justice, to might against right, is vain, and his captive is free.

In *Neal vs. Farmer* (9 Georgia Reports, page 555), the Court will find a distinct adoption of this view, that the title of the slave-owner to his slave is of the kind that I have stated, derived from, and maintained by, force. Indeed, that the planter's title is but the title of the original captor. The action was brought by Nancy Farmer against William Neal to recover damages for the killing of a negro slave, the property of Mrs. Farmer. On the trial, the plaintiff proved the killing and closed. The jury found a verdict for plaintiff for \$825. An objection was made to the legality of the verdict on the ground that, in cases of felony the civil

remedy is suspended until the offender is prosecuted to conviction or acquittal. This principle was admitted, but the Court below held that the killing of a slave was not a felony at common law, and refused a new trial. The question of law was brought before the Supreme Court by writ of error.

The Court held, "In cases of felony, the civil remedy is suspended until the offender is prosecuted to conviction or acquittal. It is not felony in Georgia, by the common law, to kill a slave, and the only *legal restraint upon the power of a master over the person of the slave in Georgia, is such as is imposed by statute.*"

At page 580 of the report, the learned Court proceeds: "Licensed to hold slave property, the Georgia planter held the slave as a chattel; and whence did he derive title? Either directly from the slave trader, or from those who held under him, and he from the slave captor in Africa. The property in the slave of the planter, became, thus, just the property of the original captor. In the absence of any statutory limitation on that property he holds it as unqualifiedly as the first proprietor held it, and his title and the extent of his property were sanctioned by the usage of nations which had grown into a law.

"There is no sensible account to be given of property in slaves here but this. What were then the rights of the African Chief in the slave which he had captured in war? *The slave was his to sell, or to give, or to kill.*"

The law of nations built upon the law of nature, has adopted this same view of the *status* of slavery, as resting on force against right, and finding no support outside of the jurisdiction of the municipal law which establishes it.

Now it is very easy to say, as is said by the learned counsel in his points, that we are not justified in prohibiting the slave-owner from any State of the Union, from bringing his slaves hither, and it may be urged that there is no disturb-

ance of our public peace, and no encroachment upon the public morals, or upon social and political principles of this community, in *allowing* the slave-owner to bring his slaves hither, in *allowing* them to remain here, and in *allowing* him to take them away.

But this is not a correct statement of the proposition. It is not a question of the officious interference of our law with the agreeing dispositions of the master and his slaves for the maintenance of the relation. The question in form and substance is, what is the duty of our law, what its authority, what are its powers and processes, what the means and the principles of enforcing it, in case this *amicable agreement* between master and slave shall, at any point of the continuance of the *status* in our community, cease. This was the point with Lord Mansfield in the case of *Sommersett*. Lord Mansfield, if he has been sainted by philanthropists, as the learned counsel has said, for his devotion to liberty, as exhibited in the case of *Sommersett*, very little deserves such peculiar veneration. Lord Mansfield tried as hard as a judge ever did to avoid deciding that case; he was held as firmly by habit, by education, by principle, by all his relations with society, to what would be called, in the phrase of our day, a conservative and property view of the subject, as any man could be. It is amusing to follow the report in the *State Trials*, and see how the argument was postponed, from time to time, on a suggestion thrown out by the Court, of the immense influence on property that the decision in the particular case would have. If your Honors please, at the time the point was raised before Lord Mansfield, there were within the realm of England fourteen thousand slaves, brought from the plantations and held, without a suspicion of their right by their masters, under the professional opinions of the eminent lawyers, Sir Charles York and Lord Talbot, that the Virginia negro might be lawfully held as a slave within the realm of England. But, notwithstanding all the

suggestions of the Court, for some reason or other, it was not thought useful or proper to cover up, or to buy up this question of personal liberty on English soil and under English law. Then, Lord Mansfield, being as my learned friend has suggested, a mere common law judge in a mere common law court, being the Chief Justice of England, a great magistrate, the head of the Court to which was committed the care and protection of the personal rights of the community, as established and regulated and defended by the law of the realm, was obliged, by the mere compulsion of his reason, to decide that case as he did. There is no poetry, no sentiment, no philanthropy, no zeal, no desire to become a subject of saint-hood with future generations, to be found in his decision. Not one word of any of these. It was extorted in submission to the great powers of his own reason. He says, most truly, that the difficulty is, that if slavery be introduced and sustained at all, it must be introduced and sustained according to its length and breadth, with all its incidents and results, and if our law recognizes it, then we must adopt and administer some system of positive municipal law, external to our own, for we have no such domestic *status* in our own society. Therefore, says Lord Mansfield, if the merchants will not settle this case, if no appeal to Parliament for legislation on the subject will be made, and if I must decide it, I do not know of any law of England which permits the master of this vessel, on which the slave Sommersett is embarked, to hold him in confinement, and he must be set free. And the Court below was asked to say in this State, "does the law of New York furnish any ground and authority by which it can permit, or sustain, or enforce the restraint upon the liberty of these Virginia negroes, in the city of New York, practiced by this man and woman, Mr. and Mrs. Lemmon?"

Now, it will readily be seen, as suggested (under subdivision D of my third point), that this consequence must follow;

for the idea that our law can have a mere *let alone* policy, can leave these people to manage the affair among themselves, is precluded the moment the process of Habeas Corpus has brought them within the control of the magistrate. Certainly, we have no law to prohibit the master and mistress from coming here with their faithful servants, from remaining here peaceably under this tie of fidelity, and leaving here under the same tie of fidelity.

If there is no writ of Habeas Corpus sued out, if no action of false imprisonment is brought, no complaint for assault and battery is made, and nothing comes up for judicial inquiry, then this contented "pupilage"—this relation of "honorable slaveholder to devoted and attached slaves" is not interfered with by us. When liberty was awarded to these eight persons they were not prohibited from going back to No. 8 Carlisle street, to the dominion of the Lemmons, or from embarking on a steamship for a voyage to Texas. All the judgment declares is, that, if you are restrained *by force*, and *against* your will, there is no such restraint allowed by law.

The question is, as Lord Mansfield says, what the *law* shall do, when *its* force and authority are invoked. It is the same practical difficulty that arose under Dogberry's instructions to the watch: "This is your charge; you shall comprehend all *vagrom* men. You are to bid any man stand, in the prince's name." "How," inquires the watch not impertinently, "how, if he will not stand?" Dogberry bravely meets the emergency. "Why, then take no note of him, *but let him go*; and presently call the rest of the watch together, and thank God you are rid of a knave." Whoever, in the name of our law, undertakes to maintain a slave's subjection, will find no wiser counsel than Dogberry's to follow, if the slave objects to his authority.

The train of consequences which must follow from the recognition of slavery by our law, as a *status* within our territory, I have illustrated by a few instances or examples,

under subdivision D of my third point. I will not enlarge upon them. Certainly I take no pleasure in repeating them for any purposes of sarcasm or invective.

I pass now to a subject, considered in distinct propositions upon my points, and concerning which the course of my learned friend's argument requires a few observations from me. I refer to the proposition, that the rule of comity which permits the transit of strangers and their property through a friendly State, does not require our laws to uphold the relation of slave-owner and slave, within our State, between strangers. By that general system of jurisprudence made up of certain principles held in common by all civilized States, known as the "Law of Nations," in one of the senses in which the term is used by publicists, men are not the subject of property. This proposition the learned counsel has met by the argument, that property does not exist, at all, by the law of nature, but is wholly the growth of civil society and the creature of positive or municipal law. If he means by this argument, that the title of an individual to a particular item or subject of property, is not completely ascertained or established by the law of nature; that I do not make title to the house in which I live, or the books which I read, by the law of nature, I have no dispute with him. But, if he means, that the distinction between *man* as the owner, and *things* as the subjects, of property, does not arise by the law of nature, he is, I think, entirely in error. I suppose that the relation of man, as Lord over all ranks of the brute creation and all inanimate things in this world, is derived from nature, as by direct grant from the Almighty Creator of the world and all things therein; that by this law, the relations of persons to things, which is but another name for the institution of *property*, is a natural relation. If it is not a natural relation—if it does not spring out of the creation of man, and his being placed on this earth by his Maker, I do not understand its origin.



When we accord to strangers a transit through out territory, with property, we limit that right to what is the subject of property by the law of nature, unless our municipal law recognizes property other than such as the law of nature embraces.

But further, the learned counsel has argued, that, because we recognize, under the general principles of comity, certain rights that grow out of the condition of slavery, under the foreign municipal system, which accredits and supports it, we are involved in the obligation of not imputing *immorality* to that relation, and, that, upon the same reasons or inducements of comity, by which we recognize these rights thus grown up, we must enforce and maintain the condition itself in our own municipal system. If the Court please, we ought not to be called upon to confound propositions naturally so distinct as these, and which, I respectfully submit, are justly discriminated upon my printed brief, under subdivision F of the third point. We recognize, unquestionably, the establishment of slavery in Virginia as the lawful origin of certain rights, and open our Courts to the maintenance and enforcement of those rights. As the learned counsel has said, if upon the sale of a slave in Virginia a promissory note be taken by the vendor, and suit brought upon it in our Courts, the action would be sustained; the security would not be avoided as founded upon an immoral or illegal consideration. Nay, further than that. Suppose the relation of master and slave, once lawfully subsisting in Virginia, to have ceased and the slave to have become free, by manumission, or otherwise; suppose the freedman to have become an inhabitant of our State, and finding his master accessible to process here, to have sued him for wages, for the service in Virginia, while a slave, alleging that he had performed labor and had been paid nothing for it. By our law no such action would lie. No debt accrued by the law of Virginia, and that law must give the right, before our law

can afford a remedy. We might suppose the relation to have terminated advantageously to the master, the slave having been a charge and burden upon the master beyond any service he could render. The slave, become free, and found here in the possession of property, could the master sue him here for his support, during the time that, without being remunerated by his labor, he had maintained, fed, clothed and cared for him? Certainly, no such action could be sustained. Apply these principles to the ordinary domestic relations, and there is no mystery in this distinction. We recognize a foreign marriage, good, according to the laws of the community in which it is celebrated, as giving title to property here, in this State, real or personal, dependent upon that relation. When a husband and wife, united under a foreign marriage, come here, we recognize their relation as husband and wife, with such traits and consequences as accord with our laws. But suppose a man to have married a wife in Massachusetts, and that by the law of Massachusetts, while the parties continue there, the husband has the supposed common law right to beat his wife with a stick no bigger than his thumb; suppose this a trait of the conjugal relation, a marital right in Massachusetts. Now, the claim of the learned counsel is, not only that we should accord to the relation of marriage arising under the law of Massachusetts, consequences in respect of property here, which belong to the relation, but, that, when husband and wife come here, as residents or, at least, *in transitu*, we should allow this special marital right to continue, and be exercised under our law here, although unlawful between husband and wife by our laws. The absurdity of such a claim strikes everyone. If the husband pleaded, as a defence against punishment here, that by the law of Massachusetts, where the marriage was instituted, the violent acts were permitted, no Court would tolerate so idle and frivolous a suggestion.

The relation of master and apprentice presents a nearer

analogy to that of slavery than any civil relation now recognized by our law. It is wholly the creature of positive statute, and we take no notice whatever of the relation, of the same name and substance, established by the laws of the other States of the Union, as giving any personal *status* within our territory. A master and his apprentice coming here from Connecticut, in the judgment of our law, no longer hold that relation to each other. Our law furnishes no aid to the master's authority, no compulsion upon the apprentice's obedience.

The learned counsel, in his plea for your indulgence to the institution of chattel slavery, has thought to disparage the great names in the British judiciary which have proscribed that condition as unworthy to be tolerated by their laws, by holding up to odium the system of *white slavery*, which, under the name of villenage, long ago subsisted in England.

However nearly the traits of this servitude may, at one time or another, have resembled the system of slavery which finds support and favor in parts of our country, there was always this feature of hope and promise of the amelioration and final extirpation of villenage, which will be sought in vain in the system of slavery in our States. Villenage was within the comprehension and subject always to the influences of the *common law*, which, indeed, is but another name for common right and general justice. No system of injustice and of force brought within the grasp of the principles of the common law, but must, sooner or later, be vanquished and exterminated. The heaviest gloom which rests upon the system of chattel slavery comes from this very fact, that it is outlawed from all these influences; that reason and justice, duty and right, as they reject it, are rejected by it, and find no inlet through the proof armor of force and interest in which it is cased.

The learned counsel has remarked upon the silent and

gradual retreat of villenage before the growing power of justice and civilization, till it finally disappears from English history, one scarcely knows when. It wore out, he says, without bloodshed, without violence, without civil or social disturbance or disquiet. It is not strictly true that villenage was never the cause of serious civil disorder in England. Jack Cade's rebellion and Wat Tyler's insurrection were, really, servile insurrections to which intolerable oppression had urged this abject class. But be this as it may, the learned counsel's complacency, first in the long endurance of villenage, and, second, in its peaceful abrogation, has not restrained him from a sarcastic suggestion, that if there had been in England "a sect of abolitionists" hostile to villenage, that system would have survived to our day. If the tendency and effect of the teaching of this "sect of abolitionists" be, indeed, to confirm and perpetuate the system of slavery, it should attract the favor rather than the wrath of one, who, like my learned friend, thinks slavery to be "just, benign, beneficent, not inconsistent with strict justice, and pure benevolence."

But I can relieve the learned counsel from any doubt or uncertainty as to the efficient influences which caused the decay and final extinction of villenage in England. They were the *common law* and the *Christian religion*.

The common law, having, as I stated, comprehended villenage within its principles and processes, showed it no quarter, but by every act and contrivance reduced it to narrower and narrower limits. It admitted no intendments in its favor, gave every presumption against it; knew no mode to make a villein of a freeman, a hundred to convert a villein into a freeman. Mr. Hargreave, in his celebrated argument in *Sommersett's case*, gives a just account of these successful efforts of the common law. "Another cause," says this eminent lawyer, "which greatly contributed to the extinction of villenage, was the discouragement of it by courts

of justice. They always presumed in favor of liberty, throwing the '*onus probandi*' upon the lord, as well in the writ of *Homine Replegiando*, where the villein was plaintiff, as in the *Nativo Habendo*, where he was defendant. Nonsuit of the lord after appearance in the *Nativo Habendo*, which was the writ for asserting the title of slavery, was a bar to another *Nativo Habendo*, and a perpetual enfranchisement; but nonsuit of the villein after appearance in a *Libertate Probanda*, which was one of the writs for asserting the claim of liberty against the lord, was no bar to another writ of the like kind. If two plaintiffs joined in a *Nativo Habendo*, nonsuit of one was a nonsuit of both; but it was otherwise in a *Libertate Probanda*. The lord could not prosecute for more than two villeins in one *Nativo Habendo*; but any number of villeins of the same blood might join in one *Libertate Probanda*. Manumissions were inferred from the slightest circumstances of mistake or negligence in the lord, from every act or omission which legal refinement could strain into an acknowledgment of the villein's liberty. If the lord vested the ownership of lands in the villein, received homage from him, or gave a bond to him, he was enfranchised. Suffering the villein to be on a jury, to enter into religion and be professed or to stay a year and a day in ancient demesne without claim, were enfranchisements. Bringing ordinary actions against him, joining with him in actions, answering to his action without protestation of villenage, imparling in them or assenting to his imparlance, or suffering him to be vouched without counter-pleading the voucher, were also enfranchisements by implication of law. Most of the constructive manumissions I have mentioned were the received law, even in the reign of the first Edward. I have been the more particular in enumerating these instances of extraordinary favor to liberty, because the anxiety of our ancestors to emancipate the ancient villeins so well accounts for the establishment of any rules of law calculated to obstruct

the introduction of a new stock. It was natural, that the same opinions, which influenced to discountenance the former, should lead to the prevention of the latter."

The other operative agency in the gradual extinction of the offensive system of villenage was the influence of the Christian religion, under the auspices of the church of Rome, then, as well, the national church of England. Macaulay thus ascribes the chief merit in this beneficent social reform to the Romish priesthood. "It is remarkable that the two greatest and most salutary social revolutions which have taken place in England, that revolution, which, in the thirteenth century, put an end to the tyranny of nation over nation, and that revolution which, a few generations later, put an end to the property of man in man, were silently and imperceptibly effected. They struck contemporary observers with no surprise, and have received from historians a very scanty measure of attention. They were brought about neither by legislative regulation nor by physical force. Moral causes noiselessly effaced, first the distinction between Norman and Saxon, and then the distinction between master and slave. None can venture to fix the precise moment at which either distinction ceased. Some faint traces of the old Norman feeling might perhaps have been found late in the fourteenth century. Some faint traces of the institution of villenage were detected by the curious so late as the days of the Stuarts; nor has that institution ever, to this hour, been abolished by statute.

"It would be most unjust not to acknowledge that the chief agent in these two deliverances was religion; and it may, perhaps, be doubted whether a purer religion might not have been found a less efficient agent. The benevolent spirit of the Christian morality is undoubtedly adverse to distinctions of caste. But to the church of Rome such distinctions are peculiarly odious, for they are incompatible with other distinctions which are essential to her system." "How

great a part the Catholic ecclesiastics had in the abolition of villenage, we learn from the unexceptionable testimony of Sir Thomas Smith, one of the ablest counsellors of Elizabeth. When the dying slaveholder asked for the last sacraments, his spiritual attendants regularly adjured him, as he loved his soul, to emancipate his brethren, for whom Christ had died. So successfully had the church used her formidable machinery, that before the Reformation came, she had enfranchised almost all the bondmen in the kingdom, except her own, who, to do her justice, seem to have been very tenderly treated." (Hist. Eng., vol. 1, pp. 20, 21.)

These influences, then, of law and of religion were the efficient agents in extirpating villenage, a civil condition which, so long as it subsisted, was a reproach to the liberty of England, and to the principles of the common law. Why should the learned counsel hope to heap opprobrium upon these principles of justice and religion, when invoked in favor of an inferior race, and against a system of slavery so much more oppressive than the system of villenage, because our people who have espoused and maintain views opposed to this present system of wrong against right, and force against justice and nature, are the offspring of the British nation, which, in the early stages of its civilization, had such a system, or a similar system? If these, our ancestors, and we had nourished and developed it, if we had extended it, if we had made it the basis of prosperity in England and this country, if we had boasted its justice and benevolence, if we had extended it so as to embrace more and more of the nation, if we had made the law astute and even violent to support and maintain it, if we had discouraged every intendment against it, and if it was now approved and applauded as an institution which the civilization and Christianity of the present day accept, then we might well be accused of inconsistency, in being hostile to chattel slavery in the negro race. But, it seems to me, that the influences

of the common law of England, which we inherit, and of the Christian religion, as vindicated in the absolute extirpation of villenage from the social system of England, by peaceful means, will suffer no dishonor by performing the same service, and impressing upon the judiciary of this State the same principles of absolute inhospitality to negro slavery within our borders, even for the briefest period, or over the most narrow space.

If the Court please, the judgment below, the reasons for which are very tersely and properly expressed by the Court which pronounced it, is either to be affirmed or reversed. *You* are to declare the law of this State. If you declare that slavery may be introduced here, there is no appeal from your decision. If you hold that it may not be introduced here, and affirm the judgment of the Court below, an appeal may carry the question to the Supreme Court of the United States. That such appeal must be dismissed by that Supreme tribunal, for want of jurisdiction of the subject, I confidently submit, must follow from the authorities and the principles I have had the honor to present to this Court.

The result of your judgment cannot be doubtful, if I am right in the opinion that it is constrained by no paramount control of Federal power. It is as true now, as in the time of Littleton and of Coke, that he shall be adjudged guilty of impiety toward God and of cruelty toward man, who does not favor liberty; and what they, in their day, declared of the law of England, your decision shall pronounce as the law of New York, that, **IN EVERY CASE**, it shows favor to liberty.

I have, your Honors will bear witness, confined myself in this discussion, to mere juridical inquiries, and have strictly abstained from any mention of popular or political considerations. I should not, now, think myself justified in any allusions to those considerations, but for the very distinct suggestion of the learned counsel, that there was a momentous



pressure upon the freedom of your judgments in this matter, growing out of a certain formidable, and yet, as he thought, inevitable, result to follow from a decision of this question, adversely to the views he has had occasion to present. He has named to you as the parties to this controversy, the State of New York and the State of Virginia—one, first in population and in wealth, and greatest in the living energies of her people—the other, richest in the memories of the past, and most powerful in the voices of her dead. I am not aware that the State of New York, in any public act or declaration, has failed, to any degree, of that respect for Virginia, which belongs to her as a sister State, or as a political community. Nor do I know or think that any citizens of this State fall at all behind the learned counsel in his affection and veneration for the great men in the history of Virginia, by whose careers of public service and of public honors, she has gained the proud title of the Mother of Presidents. Nor do I know that that portion of our people, its great majority, who, with their veneration for Washington, and Jefferson, and Madison, and Henry, and Wythe, and Mason, cherish and defend the opinions upon slavery which those statesmen held, honor them or Virginia less than those who raise statues of brass or of marble to their memory, and follow their principles with contumely and persecution. I do not know that an imputation can fairly be thrown upon any part of our community, of having less respect and affection for our common country and the Federal Government than is claimed here, by the learned counsel, on behalf of those who, with himself, espouse the views concerning the institution of slavery, which he has presented to the Court. Yet I understand him distinctly to insist here, that, unless this Court shall reverse this judgment, or unless a Court of paramount authority, that can control still further the question, shall reverse it, our Federal system of government is actually in danger—that indeed, it

cannot long exist, without both a judicial and popular recognition of the *legal* universality of slavery throughout our country.

If it please the Court, I am unable to discern in the subject itself, or in the aspect of the political affairs of the country, any grounds for these alarming suggestions, which should disturb, for a moment, your Honors' deliberations or determinations on the subject before you. I may be permitted to say, however, that if the safety and protection of this local, domestic institution of slavery, in the communities where it is cherished, must ingraft upon our Federal jurisprudence the doctrine that the Federal Constitution, by its own vigor, plants upon the virgin soil of our common territories the growth of chattel slavery—thus putting to an open shame the wisdom and the patriotism of its framers—if they must coerce, by the despotism of violence and terror, into its support at home, their whole white population; if they must exact from the Free States a license and a tolerance for what reasons of conscience and of policy have purged from their own society, and subjugate to this oppression the moral freedom of their citizens; if the institution of slavery, for its local safety and protection, is to press this issue, step by step, to these results; if such folly and madness shall prevail, then, by possibility, a catastrophe may happen: this catastrophe will be, not the overthrow of the general and constituted liberties of this great nation, not the subversion of our common government, but the destruction of this institution, local and limited, which will have provoked a contest with the great forces of liberty and justice, which it cannot maintain, and must yield in a conflict which it will, then, be too late to repress.

## II

### ADDRESS TO THE JURY IN SUMMING UP FOR THE PROSECUTION IN THE CASE OF THE UNITED STATES AGAINST THE OFFICERS AND CREW OF THE SCHOONER SAVANNAH. (THE SAVANNAH PRIVATEERS)

#### NOTE

At the very beginning of the Civil War the government of the Confederate States issued letters of marque to privateers fitted out for the purpose of carrying on warfare against the commercial marine of the United States. The schooner "Savannah" of Charleston, mounting one pivot gun, was one of these privateers, and fortified with the authority of a letter of marque issued by the Confederate States, began its depredation upon the commerce of the United States.

On the 2nd of June, 1861, the "Savannah" sailed from the port of Charleston and on the following day, after having captured a brig, laden with a cargo of sugar, was herself taken as prize by the United States Brig of War Perry and delivered to the commander of the United States blockading squadron off Charleston. The officers and crew of the "Savannah" were taken in custody by the United States naval authorities and in the course of the month of June delivered to the United States marshal for the Southern District of New York. Upon the application of the District Attorney a warrant was issued under which the officers and crew of the "Savannah" were committed for trial.

On the 16th of the following month the Federal Grand Jury, sitting in New York, brought in an indictment against them for robbery on the high seas—in short for piracy.

On October 23, 1861, the case came on for trial before Judges Nelson and Shipman. Mr. E. Delafield Smith was the United States District Attorney and he had as associate counsel, Mr. Evarts, Mr. Samuel Blatchford and Mr. Ethan Allen. The officers and crew of the "Savannah" were thirteen in number, one of whom, however, was used as a witness for the prosecution and against him a *nolle prosequi* was entered. The twelve remaining

prisoners were represented by Mr. Larocque, the elder, Mr. Daniel Lord, Mr. James T. Brady, Mr. Algernon S. Sullivan, Mr. Joseph S. Dukes, Mr. Isaac Davega and Mr. Maurice Mayer.

The trial continued for eight days, resulting in a disagreement of the jury. Its conduct on the part of the prosecution was wholly in the hands of the District Attorney and Mr. Evarts. All of the counsel for the prisoners participated actively in the trial either in arguing points of law or in opening and summing up to the jury. Mr. Larocque opened to the jury for the defense, and Messrs. Dukes, Sullivan, Davega and Brady all addressed the jury in summing up. On the close of Mr. Brady's argument—October 29—Mr. Evarts began the closing argument to the jury for the prosecution, completing it on the following day.

The attitude of the Government towards the "insurrection" in the southern slaveholding States, withholding as it did every recognition of the Confederate States as a separate political body, with national traits and functions entitled to cognizance, was calculated to bring into the case many questions which had formed the topics of political discussion for the previous decade. Thus in the defence of the prisoners to sustain the authority under which they had acted, their counsel, an array of great lawyers, introduced the question of the right of secession as it bore upon the title to recognition of the Confederate States. How vast a field of history and of political science and philosophy was thus explored and, with great skill and learning, spread before the jury, one may readily imagine.

In all this broad debate the duty devolved upon Mr. Evarts to sustain the Government, and a recent writer has said, "His argument in this memorable case is really a philosophical discussion of the bases of republican government."

Mr. Evarts, himself, in writing to an intimate friend at the time, speaks of his participation in the case, saying, "The trial was quite a laborious and responsible one for me, and I was retained for the Government only the day before the trial began. I had seven counsel with seven separate speeches against me, and had to reply (1) for the Prosecution, (2) for the Government, (3) for the Republican party, (4) for the free States, (5) for the Nation, (6) for the principles of Constitutional Government, (7) for the human race, and all this though I had a fee only for one of these interests."

## ADDRESS TO THE JURY IN THE CASE OF THE SAVANNAH PRIVATEERS

*May it please your Honors, and Gentlemen of the Jury:*

A trial in a Court of Justice is a trial of many things besides the prisoners at the bar. It is a trial of the strength of the laws, of the power of the Government, of the duty of the citizen, of the fidelity to conscience and the intelligence of the Jury. It is a trial of those great principles of faith, of duty, of law, of civil society, that distinguish the condition of civilization from that of barbarism. I know no better instance of the distinction between a civilized, instructed, Christian people, and a rude and barbarous nation, than that which is shown in the assertions of right where might and violence and the rage of passion in physical contest determine everything, and this last sober, discreet, patient, intelligent, authorized, faithful, scrupulous, conscientious investigation, under the lights of all that intelligence with which God has favored any of us; under that instruction which belongs to the learned and accredited expounders of the law of an established free Government; under the aid of, and yet not misled by, the genius or eloquence of advocates on either side.

But, after all, the controlling dominion of duty to the men before you in the persons of the prisoners, to the whole community around you, and to the great nation for which you now discharge here a vital function for its permanence and its safety,—your duty to the laws and the Government of your country (which, giving its protection, requires your allegiance, and finds its last and final resting-place, both here and in England, in the verdicts of Juries),—your duty to yourselves,—requires you to recognize yourselves not only as members of civil society, but as children of the

"Father of an Infinite Majesty," and amenable to His last judgment for your acts. Can any of us, then, fail to feel, even more fully than we can express, that sympathies, affections, passions, sentiments, prejudices, hopes, fears, feelings and responsibilities of others than ourselves are banished at once and forever, as we enter the threshold of such an inquiry as this, and never return to us until we have passed from this sacred precinct, and, with our hands on our breasts and our eyes on the ground, can humbly hope that we have done our duty and our whole duty?

Something was said to you, gentlemen of the Jury, of the unwonted circumstances of the prosecution, by the learned counsel who, many days ago, and with an impressiveness that has not yet passed away from your memory, opened on behalf of the prisoners the course of this defence.

He said to you that the number of those whose fate, for life or for death, hangs on your verdict, is equal to your own—hinting a ready suggestion that that divided responsibility by which twelve men may sometimes shelter themselves, in weighing in the balance the life of a single man, is not yours. Gentlemen, let us understand how much of force and effect there is in the suggestion, and how truly and to what extent the responsibility of a Jury may be said to include this issue of life and death. In the first place, as jurymen, you have no share or responsibility in the wisdom or the justice of those laws which you are called upon to administer. If there be defects in them—if they have something of that force and severity which is necessary for the maintenance of Government and the protection of peace and property, and of life on the high seas—you have had no share in their enactment, and have no charge, at your hands, of their enforcement. In the next place, you have no responsibility of any kind in regard to the discretion of the representatives of this Government in the course which they choose to take, as to whether they will prosecute or leave unprosecuted.

You do not, within the limits of the inquiry presented to you, dispose of the question, why others have not been presented to you; nor may that which has been done in a case not before you, serve as a guide for the subject submitted to your consideration. So, too, you have no responsibility of any kind concerning the course or views of the law which this tribunal may give for your guidance. The Court does not make the law, but Congress does. The Court declares the law as enacted by the Government, and the Jury finds the facts—giving every scrutiny, every patient investigation, every favor for life, and every reasonable doubt as to the facts, to the prisoners. Having disposed of that duty, as sober, intelligent and faithful men, graduating your attention only by the gravity of the inquiry, you have no further responsibility. But I need not say to you, gentlemen, that if any civilized government is to have control of the subject of piracy—if pirates are to be brought within the jurisdiction of the criminal law—the very nature of the crime involves the fact that its successful prosecution necessarily requires that considerable numbers shall be engaged in it. I am quite certain that, if my learned friends had found in the circumstances of this case nothing which removed it out of the category of the heinous crime of private plunder at sea, exposing property and life, and breaking up commerce, they would have found nothing in the fact that a ship's crew was brought in for trial, and that the number of that crew amounted to twelve men, that should be pressed to the disturbance of your serene judgment, in any disposition of the case. Now, gentlemen, let us look a little into the nature of the crime, and into the condition of the law.

The penalty of the crime of piracy or robbery at sea stands on our statute books heavier than the penalty assigned for a similar crime committed on land—which is, in fact, similar, so far as concerns its being an act of depreda-

tion. It may be said, and it is often argued, that, when the guilt of two offences is equal, society transcends its right and duty when it draws a distinction in its punishments; and it may be said, as has been fully argued to you—at least, by implication, in the course of this case—that the whole duty and the whole responsibility of civil Governments, in the administration of criminal law and the punishment of crime, has to do with the retributive vengeance, as it were, on the moral guilt of the prisoner. Now, gentlemen, I need not say to you, who are experienced at least in the common inquiries concerning governments and their duties, that, as a mere naked and separate consideration for punishing moral guilt, Government leaves, or should leave, vengeance where it belongs—to Him who searches the heart and punishes according to its secret intents—drawing no distinction between the wicked purpose which fully plans, and the final act which executes that purpose. The great, the main duty—the great, the main right—of civil society, in the exercise of its dominion over the liberties, lives, and property of its subjects, is the good of the public, in the prevention, the check, the discouragement, the suppression of crime. And I am sure that there is scarcely one of us who, if guilt, if fault, if vice could be left to the punishment of conscience and the responsibility of the last and great assize, without prejudice to society, without injury to the good of others, without, indeed, being a danger and a destruction to all the peace, the happiness, and the safety of communities, would not readily lay aside all his share in the vindictive punishments of guilty men. But society, framed in the form and for the purposes of Government, finds, alas! that this tribunal of conscience, and this last and future accountability of another world, is inadequate to its protection against wickedness and crime in this.

You will find, therefore, in all, even the most enlightened and most humane codes of laws, that some necessary atten-



tion is paid to the predominant interest which society has in preventing crime. The very great difficulty of detecting it, the circumstances of secrecy, and the chances of escape on the part of the criminal, are considerations which enter into the distribution of its penalties. You will find, in a highly commercial community, like that of England, and to some extent—although, I am glad to say, with much less severity—in our own, which is also a highly commercial community, that frauds against property, frauds against trade, frauds in the nature of counterfeiting and forgery, and all those peaceful and not violent but yet pernicious interferences with the health and necessary activity of our everyday life, require the infliction of severe penalties for what, when you take up the particular elements of the crime, seems to have but little of the force, and but little of the depth of a serious moral delinquency.

The severity of the penalties for passing counterfeit money is inflicted upon the poor and ignorant who, in so small a matter as a coin of slight value, knowingly and intelligently, under even the strongest impulses of poverty, are engaged in the offence. Now, therefore, when commercial nations have been brought to the consideration of what their enactments on the subject of piracy shall be, they have taken into account that the very offence itself requires that its commission should be outside of the active and efficient protection of civil society—that the commission of the crime involves, on the part of the criminals, a fixed, deliberate determination and preparation—and that the circumstances under which the victims, either in respect of their property or of their lives, are exposed to these aggressions, are such as to make it a part of the probable course of the crime, that the most serious evils and the deepest wounds may be inflicted. Now, when a crime, not condemned in ethics or humanity, and which the positive enactments of the law have made highly penal, yet contains

within itself circumstances that appeal very strongly to whatever authority or magistrate has rightful control of the subject for a special exemption, and special remission, and special concession from the penalty of the law, where and upon what principles does a wise and just, a humane and benignant Government, dispose of that question? I agree that, if crimes which the good of society requires to be subjected to harsh penalties, must stand, always and irrevocably, upon the mere behest of judicial sentence, there would be found an oppression and a cruelty in some respects, that a community having a conscientious adherence to right and humanity would scarcely tolerate. Where, then, does it wisely bestow all the responsibility, and give all the power that belongs to this adjustment, according to the particular circumstances of the moral and personal guilt, which must be necessary, and is always conceded? Why, confessedly, to the pardoning power, alluded to on one side or the other—though chiefly on the part of the prisoners' counsel—in the course of this trial. Now, you will perceive, at once, what the difference is between a Court, or a Jury, or a public prosecuting officer, yielding to particular circumstances of actual or of general qualification of a crime charged,—so that the law shall be thwarted, and the certainty and directness of judicial trial and sentence be made the sport of sympathy, or of casual or personal influences,—and placing the pardoning power where it shall be governed by the particular circumstances of each case, so that its exercise shall have no influence in breaking down the authority of law, or in disturbing the certainty, directness, and completeness of judicial rules. For, it is the very nature of a pardon,—committed to the Chief Magistrate of the Federal Union in cases of which this Court has jurisdiction, and to the Chief Magistrate of every State in the Union in cases of which the State tribunals take cognizance,—that it is a recognition of the law, and of the sentence of the law, and

leaves the laws undisturbed, the rules for the guidance of men unaffected, the power and strength of the Government unweakened, the force of the judiciary unparalyzed, and yet disposes of each case in a way that is just, or if not just, is humane and clement, where the pardon is exercised.

Now, gentlemen, I shall say nothing more on the subject of pardon. It is a thing with which I have nothing to do—with which this learned Court has nothing to do—with which you, as jurymen, have nothing to do—beyond the fact that this beneficent Government of ours has not omitted from its arrangement, in the administration of its penal laws, this divine attribute of mercy.

Now, there being the crime of piracy or robbery on the high seas, which the interests of society, the protection of property and of life, the maintenance of commerce, oblige every State and every nation, like ours, to condemn—what are the circumstances, what are the acts, that, in view of the law, amount to piracy? You will understand me that, for the present, I entirely exclude from your consideration any of the particular circumstances which are supposed to give to the actual crime perpetrated a public character, lifting it out of the penal law that you administer, and out of the region of private crime, into a field of quite different considerations. They are, undoubtedly, that the act done shall be with intent of depriving the person who is in possession of property, as its owner, or as the representative of that owner, of that property. That is what is meant by the Latin phrase, with which you are quite as familiar now, at least, as I, *animo furandi*—with the intention of despoiling the owner of that which belongs to him. And, to make up the crime of robbery on land, in distinction from larceny or theft, as we generally call it (though theft, perhaps, includes all the variety of crime by which the property of another is taken against his will), robbery includes, and *piracy*, being robbery at sea, includes, the idea that it is done with the application, or the

threat, or the presence of force. There must be actual violence, or the presence and exhibition of power and intent to use violence, which produces the surrender and delivery of the property. Such are the ingredients of robbery and piracy. And, gentlemen, these two ingredients are all; and you must rob one or the other of them of this, their poison, or the crime is completely proved, when the fact of the spoliation, with these ingredients, shall have been proved. The use that the robber or the pirate intends to make of the property, or the justification which he thinks he has by way of retaliation, by way of injury, by way of provocation, by way of any other occasion or motive that seems justifiable to his own conscience and his own obedience to any form whatever of the higher law, has nothing to do with the completeness of the crime, unless it come to what has been adverted to by the learned counsel, and displayed before you in citations from the law-books—to an honest, however much it may be a mistaken and baseless, idea that the property is really the property of the accused robber, of which he is repossessing himself from the party against whom he makes the aggression.

Now, unless, in the case proved of piracy, or robbery on land, there be some foundation for the suggestion that the wilful and intentional act of depriving a party of his property rests upon a claim of the robber, or the pirate, that it is his own property (however baseless may be the claim), you cannot avoid, you cannot defeat, the criminality of the act of robbery, within the intention of the law, by showing that the robber or the pirate had, in the protection of his own conscience, and in the government of his own conduct, certain opinions or views that made it right for him to execute that purpose. Thus, for instance, take a case of morals: A certain sect of political philosophers have this proposition as a basis of all their reasoning on the subject of property,—that is, that property, the notion of separate property in anything, as be-

longing to anybody, is theft; that the very notion that I can own anything, whatever it may be, and exclude other people from the enjoyment of it, is a theft made by me, a wrongful appropriation, when all the good things in this world, in the intention of Providence, were designed for the equal enjoyment of the human race. Well, now, a person possessed of that notion of political economy and of the moral rights and duties of men, might seek to avail himself of property owned and enjoyed by another, on the theory that the person in possession of it was the original thief, and that he was entitled to share it. I need not say to you that all these ideas and considerations have nothing whatever to do with the consideration of the moral intent with which a person is despoiled of his property.

Now, with regard to force, I do not understand that my learned friends really make any question, seriously, upon the general principle of what force is, or upon the facts of this case, that this seizure of the Joseph by the Savannah had enough of force,—the threat, the presence, and exhibition of power,—and of the intent to use it, to make the capture one of force, if the other considerations which are relied upon do not lift it out of that catalogue of crime.

It is true that the learned counsel who last addressed you\* seemed to intimate, in some of his remarks, near the close of his very able and eloquent and interesting address, that there was not any force about it, that the master of the Joseph was not threatened, that there was no evidence that the cannon was even loaded, and that it never had been fired off. Well, gentlemen, the very illustration which he used of what would be a complete robbery on land,—the aggressor possessing a pistol, and asking in the politest manner for your money,—relieves me from arguing that you must fire either a cannon or a pistol, before you have evidence of force. If our rights stand on that proposition, that when a pistol is

\* James T. Brady.

presented at our breast, and we surrender our money, we must wait for the pistol to be fired before the crime is completed, you will see that the terrors of the crime of robbery do not go very far towards protecting property or person, which is the object of it.

When, gentlemen, the Government, within a statute which, in the judgment of the Court, shall be pronounced as being lawfully enacted under the Constitution of the United States, has completed the proof of the circumstances of the crime charged, it is entitled at your hands to a conviction of the accused, unless, by proof adduced on his part, he shall so shake the consistency and completeness of the proof on the part of the Government, or shall introduce such questions of uncertainty and doubt, that the facts shall be disturbed in your mind, or unless he shall show himself in some predicament of protection or right under the law—(and, by “under the law,” I mean, under the law of the land where the crime is punishable, and where the trial and the sentence are lawfully attributed to be), or unless he shall introduce some new facts which, conceding the truthfulness and the sufficiency of the case made by the Government, shall still interpose a protection, in some form, against the application of the penalty of the law. I take it that I need not say to you that this protection or qualification of the character of the crime must be by the law of the land; and, whether it comes to be the law of the land by its enactment in the statutes of the United States, or by the adoption and incorporation into the law of the land of the principles of the law of nations, is a point quite immaterial to you. You are not judges of what the statutes of the United States are, except so far as their interpretation may rightfully become a subject of inquiry by the Jury, in the sense of whether the crime is within the intent of the Act, in the circumstances proved. You are not judges of what the law of nations is, in the first place; nor are you judges of how much of the law of nations

has been adopted or incorporated into the system of our Government and our laws, by the authority of its Congress or of its Courts.

Whether, as I say to you, there is a defence, or protection, or qualification of the acts and transactions which, in their naked nature, and in their natural construction, are violent interferences with the rights of property, against the statute, and the protection of property intended by the statute,—whether the circumstances do change the liability or responsibility of the criminal, by the introduction of a legal defence under the law of nations, or under the law of the land in any other form, is a question undoubtedly for the Court,—leaving to you always complete control over the questions of fact that enter into the subject. So that the suggestion, also dropped by my learned friend, at the close of his remarks, that any such arrangement would make the Jury mere puppets, and give them nothing to do, finds no place. It would not exclude from your consideration any matters of fact which go to make up the particular condition of public affairs or of the public relations of the community towards each other, in these collisions which disturb the land, provided the Court shall hold and say that, on such a state of facts existing, or being believed by you, there is introduced a legal qualification or protection against the crime charged. But, if it should be held that all these facts and circumstances, to the extent and with the effect that is claimed for them by the learned counsel as matter of fact, yet, as matter of law, leave the crime where it originally stood, being of their own nature such as the principles of law do not permit to be interposed as a protection and a shield, why, then you take your law on the subject in the same way as you do on every other subject, from the instructions of the learned and responsible Bench, whose errors, if committed, can be corrected; while your confusion between your province and the province of the Court would, both in this case, and in other

cases, and sometimes to the prejudice of the prisoner, and against his life and safety, when prejudices ran that way, confound all distinctions; and, in deserting your duty, to usurp that of another portion of the Court, you would have done what you could, not to uphold, but to overthrow the laws of your country and the administration of justice according to law, upon which the safety of all of us, at all times, in all circumstances, depends.

Now, gentlemen, let me ask your attention, very briefly, to the condition of the proof in this case, from the immediate consideration of which we have been very much withdrawn by the larger and looser considerations, as I must think them, which have occupied most of the attention of the counsel, and been made most interesting, undoubtedly, and attractive to you. These twelve men now on trial—four of them citizens of the United States, and eight of them foreigners by birth and not naturalized—formed part of the crew of a vessel, originally a pilot-boat, called the "Savannah." That crew consisted of twenty men, and one of them has given the circumstances of the preparation for the voyage, of the embarkation upon the vessel, of her weighing anchor from the port of Charleston and making her course out to sea without any port of destination, and without any other purpose than to make seizures of vessels belonging to the loyal States of the Union and its citizens. He has shown you that all who went on board, all who are here on trial, had a complete knowledge of, and gave their ready and voluntary assent to and enlistment in this service; and that the service had no trait of compulsion, or of organized employment under the authority of Government, in any act or signature of any one of the crew, as far as he knew, leaving out, of course, what I do not intend to dispute, and what you will not understand me as disregarding—the effect that may be gained from the notorious facts and the documents that attended the enterprise. He



has shown you that, going to sea with that purpose, without any crew list, without any contract of wages, they descried, early in the morning after they adventured from the port, and at a point about sixty miles to sea, this bark, and ran down to her; and that, while running down to her, they sailed under the flag of the United States, and, hailing the brig, when within hailing distance, required the master of it to come on board with his papers. Upon the inquiry of the master, by what authority they made that demand on him, the stars and stripes being then floating at the masthead of the Savannah, Captain Baker informed him that it was in the name and by the authority of the Confederate States of America, at the same time hauling down the American flag and running up the flag of the Confederacy. Whatever followed after this, gentlemen, except so far as to complete the possession of the captured vessel, by putting a prize crew on board of it (so called), sending it into Charleston, and their lodging in jail the seamen or ship's company of the Joseph that accompanied it, and procuring a sale of the vessel—anything beyond that (and this only to show the completeness of the capture, and the maintenance of the design to absolutely deprive the owners of the vessel and cargo of their property) seems to be quite immaterial. Now, when we add to this the testimony of Mr. Meyer, the master of the captured vessel, who gives the same general view of the circumstances under which his vessel was overhauled and seized by the Savannah, as well as the observations and the influences which operated upon his mind while the chase was going on, we have the completeness of the crime,—not forgetting the important yet undisputed circumstances of the ownership of the vessel, and of the nature of the voyage in which she was engaged. You will observe that this vessel, owned by, and we may suppose, judging from the position of the witnesses examined before you, constituting a good part of the property of, our fellow-countrymen

in the State of Maine, sailed on the 28th day of April, from Philadelphia, bound on a voyage to Cardenas, in Cuba, with a charter party out and back, under which she was to bring in a cargo of sugar and molasses. You will have noticed, comparing this date with some of the public transactions given in evidence, that it was after both the proclamation of Mr. Davis, inviting hostile aggressions against the commerce of the United States, on the part of whosoever should come to take commissions from him; and after the proclamation of the President of the United States, made to the people of the United States and all under its peace and protection, that if, under this invitation of Mr. Davis, anybody should assume authority to make aggressions, on the high seas, upon the private property of American citizens, they should be punished as pirates. This vessel, therefore, sailed on her voyage under the protection of the laws of the United States, and under this statement of its Government, that the general laws which protected property and seamen on the high seas against the crime of piracy were in force, and would be enforced by the Government of the United States, wherever it held power, against any aggressions that should assume to be made under the protection of the proclamation of Mr. Davis. While returning, under the protection of this flag and of this Government, she meets with hostile aggression at the hands of an armed vessel, which has nothing to distinguish it from the ordinary condition of piracy, except this very predicament provided against by the proclamation of the President, and under the protection of which the vessel had sailed, to wit, the supposed authority of Jefferson Davis; which should not, and cannot, and will not, as I suppose, protect that act from the guilt and the punishment of piracy.

Now, you will have observed, gentlemen, in all this, that whatever may be the circumstances or the propositions of law connected with this case, that may change or qualify

the acts and conduct of Mr. Baker, so far as the owners of this vessel and the owners of this cargo are concerned, there has been as absolute, as complete, as final and as perfect a deprivation of their property, as if there had been no commission—no public or other considerations that should expose them to having the act done with impunity. You will discover, then, that, so far as the duty of protection from this Government to its citizens and their property—so far as the duty of maintaining its laws and enforcing them upon the high seas—is concerned, there is nothing pretended—there is nothing, certainly, proved—that has excused or can excuse this Government, in its Executive Departments, in its Judicial Departments, in the declaration of law from the Court, or in the finding of facts by the Jury, from its duty towards its citizens and their property. And, while you have been led to look at all the qualifying circumstances that should attend your judgment concerning the act and the fact on the part of these prisoners, I ask your ready assent to the proposition, that you should look at the case of these sufferers, the victims of those men, whose property has been ventured upon the high seas in reliance on its safety against aggression, from whatever source, under the exercise of the authority of the Government to repel and to punish such crimes.

Before I go into any of the considerations which are to affect the relations of these prisoners to this alleged crime, and to this trial for such alleged crime, let us see what there are in the private circumstances particular to themselves, and their engagement in this course of proceeding, that is particularly suited to attract your favor or indulgence. Now, these men had not, any of them, been under the least compulsion, or the least personal or particular duty of any kind, to engage in this enterprise. Who are they? Four of them are citizens of the United States. Mr. Baker is, by birth, a citizen of the State of Pennsylvania;

two are citizens, by birth, of the State of South Carolina, and one of North Carolina. The eight men, foreigners, are, three of Irish origin, two of Scotch, one a German, one a native of Manilla, in the East Indies, and one of Canton, in China. Now, you will observe that no conscription, no enlistment, no inducement, no authority of any public kind has been shown, or is suggested, as having influenced any of them in this enterprise. My learned friend has thought it was quite absurd to impute to this Chinaman and this Manillaman a knowledge of our laws. Is it not quite as absurd to throw over them the protection of patriotism—the protection of indoctrination in the counsels and ethics of Calhoun—to give them the benefit of a departure from moral and natural obligations to respect the property of others, on the theory that they must surrender their own rectitude—their own sense of right—to an overwhelming duty to assist a suffering people in gaining their liberty? What I have said of them applies equally to these Irishmen, this German, and these Scotchmen—as good men, if you please, in every respect, as the same kind of men born in this country. I draw no such national distinctions; but I ask what there is, in the sober, sensible, practical consideration of the motives and purposes with which these men entered into this enterprise to despoil the commerce of the United States, and make poor men of the owners of that vessel, that should give them immunity from the laws of property and the laws of the land, or form any part in the struggles of a brave and oppressed people (as we will consider them, for the purpose of the argument) against a tyrannical and bloodthirsty Government?

No! No! Let their own language indicate the degree and the dignity of the superior motives that entered into their adoption of this enterprise: "We thought we had a right to do it, and we did it." Was there the glow of patriotism—was there the self-sacrificing devotion to work in the

cause of an oppressed people, in this? No! And the only determination that these men knew or looked at, was the lawfulness of the enterprise, in respect of the sanctions and punishments of the law. They, undoubtedly, had not any purpose or any thought of running into a collision with the comprehensive power and the all-punishing condemnation of the statutes of the United States, whether they knew what the statutes were or not; but they did take advantage of the occasion and opportunity to share the profits of a privateering enterprise against the commerce of the United States; and they were unquestionably acquainted, either by original inspection or by having a favorable report made to them, with the fundamental provision in regard to this system of privateering, so called. They knew that the entire profits of the transaction would be distributed among those who were engaged in it. Now, I am not making any particular or special condemnation of these men (in thus readily, without compulsion, and without the influence of any superior motives, however mistaken, of patriotism) beyond what the general principles of public law and general opinion, founded on the experience of privateering, have shown to be the reckless and greedy character of those who enter upon private war, under the protection of any, however recent, flag. Everybody knows it—everybody understands it—everybody recognizes the fact that, if privateers, who go in under the hope of gain, and for the purposes of spoliation, are not corrupt and depraved at the outset, they expose themselves to influences, and are ready to expose themselves to influences, which will make them as dangerous, almost, to commerce, and as dangerous to life, as if the purpose and the principle of privateering did not distinguish them from pirates. And, to show that, in this law of ours, there is nothing that is forced in its application to privateers—that there is nothing against the principles of humanity or common sense in the nation's undertaking to say, we will not

recognize any of those high moral motives, any of this superior dignity, about privateers; we understand the whole subject, and we know them to be, in substance and effect, dangerous to the rights of peaceful citizens, in their lives and their property,—reference need only be had to the action of civilized Governments, and to that of our Government as much as any, in undertaking to brush away these distinctions, wherever it had the power—that is my proposition—wherever it had the power to do so. And I ask your Honors' attention to the provision on this subject, in the first treaties which our Government—then scarcely having a place among the nations of the earth—introduced upon this very question of piracy and privateers. I refer to the twenty-first article of the Treaty of Commerce with France, concluded on the 6th of February, 1778, on page 24 of the eighth volume of the Statutes at Large. This is a commercial arrangement, entered into by this infant Government, before its recognition by the Throne of Great Britain, with its ally, the most Christian Monarch of France:

“No subjects of the Most Christian King shall apply for or take any commission or letters of marque, for arming any ship or ships to act as privateers against the said United States, or any of them, or against the subjects, people or inhabitants of the said United States, or any of them, or against the property of any of the inhabitants of any of them, from any Prince or State with which the said United States shall be at war; nor shall any citizen, subject or inhabitant of the said United States, or any of them, apply for or take any commission or letters of marque for arming any ship or ships, to act as privateers against the subjects of the Most Christian King, or any of them, or the property of any of them, from any Prince or State with which the said King shall be at war; and if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate.”

Now, we have had a great deal of argument here to show that, under the law of nations,—under the law that must control and regulate the international relations of independent powers—it is a gross and violent subversion of the natural, inherent principles of justice, and a confusion between crime and innocence, to say to men who, under the license of war, take commissions from other powers, that they shall be hanged as pirates. And yet, in the first convention which we, as an infant nation, formed with any civilized power, attending in date the Treaty of Alliance which made France our friend, our advocate, our helper, in the war of the Revolution, his Most Christian Majesty, the King of France, standing second to no nation in civilization, signalized this holy alliance of friendship in behalf of justice, and humanity, and liberty, by engaging that, whatever the law of nations might be, whatever the speciousness of publicists might be, his subjects, amenable to the law, should never set up the pretence of a commission of privateering against the penalties of piracy. Nor had this treaty of commerce, which I have referred to, anything of the nature of a temporary or warlike arrangement between the parties, pending the contest with Great Britain. It was a treaty independent of the Treaty of Alliance which engaged them as allies, offensive and defensive, in the prosecution of that war. Nor is this an isolated case of the morality and policy of this Government on the subject of piracy. By reference to the 19th Article of the Treaty between the Netherlands and the United States, concluded in 1782, at page 44 of the same volume, your Honors will find the same provision. After the same stipulation, excluding the acceptance of commissions, from any power, to the citizens or subjects of the contracting parties, there is the same provision: “And if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate.”

Now, our Government has never departed from its pur-

pose and its policy, to meliorate the law of nations, so as to extirpate this business of private war on the ocean. It is entirely true that, in its subsequent negotiations with the great powers of Christendom, it has directed its purpose to the more thorough and complete subversion and annihilation of the whole abominable exception, which is allowed on the high seas, from the general melioration of the laws of war, and does not tolerate aggressions of violence, and murder, and rapine, and plunder, except by the recognized forces contending in the field. It has attempted to secure not only the exclusion of private armed vessels from privateering, but the exclusion of aggressions on the part of public armed vessels of belligerents on private property of all kinds upon the ocean. And no trace of any repugnance or resistance on the part of our Government to aid and co-operate in that general melioration in the laws of war, in respect to property on the ocean, can be charged or proved. In pursuance of that purpose, as well as in conformity with a rightful maintenance of its particular predicament in naval war,—to wit, a larger commerce than most other nations, and a smaller navy,—it has taken logically, and diplomatically, and honestly, the position. I will not yield to these false pretences of humanity and melioration which will only deprive us of privateers, and leave our commerce exposed to your immense navies. If you are honest about it, as we are, and opposed to private war, why, condemn and repress private war in respect to the private character of the property attacked, as well as private war in respect to the vessels that make the aggressions.

Nor, gentlemen, do I hesitate to say that, whatever we may readily concede to an honest difference of opinion and feeling, in respect to great national contests, where men, with patriotic purposes, raise the standard of war against the Government, and, on the other hand, uphold the old standard to suppress the violence of war lifted against it,



we do not, we cannot, as honest and sensible men, look with favor upon an indiscriminate collection from the looser portions of society, that rush on board a marauding vessel, the whole proceeds and results of whose aggressions are to fill their own pockets. And, when my learned friends seek to go down into the interior conscience and the secret motives of conduct, I ask you whether, if this had been a service in which life was to be risked, and all the energies of the man were to be devoted to the public service, for the glory and the interest of the country, and the poor food, poor clothing and poor pay of enlisted troops, you would have found precisely such a rush to that service?

Now, I am not seeking, by these considerations, to disturb in the least the legal protections, if there be any, in any form, which it is urged have sprung out of the character of privateering which this vessel had assumed, and these men, as part of its crew, had been incorporated in. If legal, let it be so; but do not confound patriotism, which sacrifices fortune and life for the love of country, with the motives of these men, who seek privateering because they are out of employment. Far be it from me to deny that the feeling of lawful right, the feeling that statutory law is not violated, if it draw the line between doing and not doing a thing, is on the whole a meritorious consideration and a trait that should be approved. But I do object to having the range of these men's characters and motives exalted, from the low position in which their acts and conduct place them, into the high purity of the patriot and the martyr. We are trying, not the system of privateering—we are trying the privateers, as they are called; and, when they fail of legal protection, they cannot cover themselves with this robe of righteousness in motive and purpose.

Now, how much was there of violence in the meditated course, or in the actual aggression? Why, the vessel is named in the commission as having a crew of thirty. In

fact, she had twenty. Four men was a sufficient crew for a mercantile voyage. She had an eighteen pounder, a great gun that must have reached half way across the deck, resting on a pivot in the middle, capable of being brought around to any quarter, for attack. At the time this honest master and trader of the Joseph descried the condition of the vessel, he was struck with this ugly thing amidships as he called it—to wit, this eighteen pound cannon, and was afraid it was a customer probably aggressive—a robber. But he was encouraged by what? Although he saw this was a pilot boat, and not likely, with good intent, to be out so far at sea, what was this honest sailor encouraged by? The flag of the United States was flying at her mast! But, when hailed—still under that view as to the aspect presented by the marauding vessel—he is told to come on board, and asks by what authority—instead of what would have been the glad and reassuring announcement—the power of the American flag—the Confederate States were announced as the marauding authority, and the flag of his country is hauled down, and its ensign replaced by this threat to commerce. Now, when this gun, as he says, was pointed at him, and this hostile power was asserted, my learned friends, I submit to you, cannot, consistently with the general fairness with which they have pursued this argument, put the matter before you as failing in any of the completeness of proof concerning force. For, when we were purposing to show that these prisoners all the while, in their plans, had the purpose of force, if force was necessary, and that, in the act of collision with the capturing vessel, that force occurred, we were stopped, upon the ground that it was unnecessary to occupy the attention of the Court and the Jury with anything that was to qualify this vessel's violent character, by reason of the admission that, if it was not protected by the commission, or the circumstances of a public character of whatever kind and degree—about which I admit

there was no restriction of any kind,—if it stood upon the mere fact that the vessel was taken from its owners by the Savannah in the way that was testified,—it would not be claimed to be wanting in any of the quality of complete spoliation, or in any of the quality of force. Now, that defence, we may say, must not be recurred to, to protect, in your minds, these men from the penalty which the law has imposed upon the commission of piracy. It cannot be pretended that there was any defect in the purpose of despoiling the original owners, nor that there is any deficiency in the exhibition of force, to make it piracy; and you will perceive, gentlemen, that although my learned friends successively, Mr. Dukes, Mr. Sullivan, and Mr. Brady, have, with the skill and purpose of advocates, taken occasion, at frequent recurring points, to get you back to the want of a motive and intent or purpose of the guiltiness of robbing, yet, after all, it comes to this—that the inconsistency of the motive and intent, or the guiltiness of robbing, with the lawfulness, under the law of nations, of privateering, is the only ground or reason why the crime is deficiently proved.

I do not know that I need say anything to you about privateering, further than to present somewhat distinctly what the qualifications, what the conditions, and what the purposes of privateering are. In the first place, privateering is a part of war, or is a part of the preliminary hostile aggressions which are in the nature of a forcible collision between sovereign powers. Now, what is the law of nations on this subject—and how does there come to be a law of nations—and what is its character, what are its sanctions, and who are parties to it? We all know what laws are when they proceed from a Government, and operate upon its citizens and its subjects. Law then comes with authority, by right, and so as to compel obedience; and laws are always framed with the intent that there shall be no opportunity of violent or forcible resistance to them, or of violent or

forcible settlement of controversies under them, but that the power shall be submitted to, and the inquiry as to right proceed regularly and soberly, under the civil and criminal tribunals. But, when we come to nations, although they have relations towards each other, although they have duties towards each other, although they have rights towards each other, and although, in becoming nations, they nevertheless are all made up of human beings, under the general laws of human duty, as given by the common lawgiver, God, yet there is no real superior that can impose law over them, or enforce it against them. And it is only because of that, that war, the scourge of the human race—and it is the great vice and defect of our social condition, that it cannot be avoided—comes in, as the only arbiter between powers that have no common superior. I am sure that the little time I shall spend upon this topic will be serviceable; as, also, in some more particular considerations, as to what is called a state of war, and as to the conditions which give and create a war between the different portions of our unhappy country and its divided population. So, then, nations have no common superior whom they recognize under this law, which they have made for themselves in the interest of civilization and humanity, and which is a law of natural right and natural duty, so far as it can be applied to the relations which nations hold to one another. They recognize the fact that one nation is just as good, as matter of right, as another; that whether it be the great Powers of Russia, of England, of France, of the United States of America, or of Brazil, or whether it be one of the feeble and inferior Powers, in the lowest grade,—as, one of the separate Italian Kingdoms, or the little Republic of San Marino, whose territories are embraced within the circuit of a few leagues, or one of the South American States, scarcely known as a Power in the affairs of men,—yet, under the proposition that the States are equal in the family of nations,

they have a right to judge of their quarrels, and, finding occasions for quarrel, have a right to assert them, as matter of force, in the form of war. And all the other nations, however much their commerce may be disturbed and injured, are obliged to concede certain rights, that are called the rights of war. We all understand what the rights of war are on the part of two people fighting against each other. A general right is to do each other as much injury as they can; and they are very apt to avail themselves of that right. There are certain meliorations against cruelty, which, if a nation should transgress, probably other nations might feel called upon to suppress. But, as a general thing, while two nations are fighting, other nations stand by and do not intervene. But the way other nations come to have any interest, and to have anything to say whether there is war between sovereign powers, grows out of certain rights of war which the law of nations gives to the contending parties, against neutrals. For instance: Suppose Spain and Mexico were at war. Well, you would say, what is that to us? It is this to us. On the high seas, a naval vessel of either power has a right, in pursuit of its designs against the enemy, to interrupt the commerce of other nations to a certain extent. It has a right of visitation and of search of vessels that apparently carry our flag. Why? In order to see whether the vessel be really our vessel, or whether our flag covers the vessel of its enemy, or the property of its enemy. It has also a right to push its inquiries farther, and if it finds it to be a vessel of the United States of America, to see whether we are carrying what are called contraband of war into the ports of its enemy, and, if so, to confiscate it and her. Each of the powers has a right to blockade the ports of the other, and thus to break up the trade and pursuits of the people of other nations—and that without any quarrel with the other people. And so you see, by the law of nations, this state of war, which might, at first, seem to

be only a quarrel between the two contending parties, really becomes, collaterally, and, in some cases, to a most important extent, a matter of interest to other nations of the globe. But however much we suffer—however much we are embarrassed (as, for example, in the extreme injury to British commerce and British interests now inflicted in this country—the blockade keeping out their shipping, and preventing shipments of cotton to carry on their industry) we must submit, as the English people submit, in the view their Government has chosen to take of these transactions.

Now, gentlemen, this being the law of nations, you will perceive that, as there is no human earthly superior, so there are no Courts that can lay down the law, as our Courts do for our people, or as the Courts of England do for their people. There are no Courts that can lay down the law of nations, so as to bind the people of another country, except so far as the Courts of that country, recognizing the sound principles of morality, humanity and justice obtaining in the government and conduct of nations towards each other, adopt them in their own Courts. So, when my learned friends speak of the law of nations as being the law that is in force here, and that may protect these prisoners in this case against the laws of the United States of America, why, they speak in the sense of lawyers, or else in a sense that will confuse your minds, that is to say, that the law of nations, as the Court will expound and explain it, has or has not a certain effect upon what would be otherwise the plain behests of the statute law.

Now, it is a part of the law of nations, except so far as between themselves they shall modify it by treaty—(two instances of which I have read in the diplomacy of our own country, and a most extensive instance of which is to be found in the recent treaty of Paris, whereby the law of nations, in respect to privateering, has been so far modified as to exclude privateering as one of the means of war)—out-

side of particular arrangements made by civilized nations, it was a part of the original law of war prevailing among nations, that any nation engaged in war might fit out privateers in aid of its belligerent or warlike purposes or movements. No difficulty arose about this when war sprang up between two nations that stood before the world in their accredited and acknowledged independence. If England and France went to war, or if England and the United States, as in 1812, went to war, this right of fitting out privateers would obtain and be recognized. But, there arises, in the affairs of nations, a condition much more obscure and uncertain than this open war between established powers; and that is, when dissension arises in the same original nation—when it proceeds from discontent, sedition, private or local rebellion, into the inflammation of great military aggression; and when the parties assume, at least (assume, I say) to be rightfully entitled to the position of Powers, under the law of nations, warring against one another. The South American States, in their controversy which separated them from the parent country, and these States, when they were Colonies of Great Britain, presented instances of these domestic dissensions between the different parts of the same Government, and the rights of war were claimed. Now, what is the duty of other nations in respect to that? Why, their duty and right is this—that they may either accord to these struggling, rebellious, revolted populations the rights of war, so far as to recognize them as belligerents, or not; but, whether they will do so or not, is a question for their Governments, and not for their Courts, sitting under and by authority of their Governments. For instance, you can readily see that the great nations of the earth, under the influences upon their commerce and their peace which I have mentioned, may very well refuse to tolerate the quarrel as being entitled to the dignity of war. They may say: “No, no; we do not see any occasion for this war, or any jus-

tice or benefit that is to be promoted by it; we do not see the strength or power that is likely to make it successful; and we will not allow a mere attempt or effort to throw us into the condition of submitting to the disturbance of the peace, or the disturbance of the commerce of the world." Or, they may say: "We recognize this right of incipient war to raise itself and fairly contend against its previous sovereign—not necessarily from any sympathy, or taking sides in it, but it is none of our affair; and the principles of the controversy do not prevent us from giving to them this recognition of their supposed rights." Now when they have done that, they may carry their recognition of right and power as far as they please, and stop where they please. They may say: "We will tolerate the aggression by public armed vessels on the seas, and our vessels shall yield the right of visitation and search to them." They may say: "We will extend it so far as to include the right of private armed vessels, and the rights of war may attend them;" or they may refuse to take this last step, and say, "We will not tolerate the business of privateering in this quarrel." And whatever they do or say on that subject, their Courts of all kinds will follow.

Apply this to the particular trouble in our national affairs that is now progressing to settle the fate of this country. France and England have taken a certain position on this subject. I do not know whether I accurately state it (and I state it only for the purpose of illustration, and it is not material), but, as I understand it, they give a certain degree of belligerent right, so that they would not regard the privateers on the part of the Southern rebellion as being pirates, but they do not accord succor or hospitality in their ports to such privateers. Well, now, suppose that one of these privateers intrudes into their ports and their hospitalities, and claims certain rights. Why, the question, if it comes up before a Court in Liverpool or London, will be—Is the right within the credit and recognition which



our Government has given? And only that. So, too, our Government took the position in regard to the revolting States of South America, that it would recognize them as belligerents, and that it would not hang, as pirates, privateers holding commissions from their authority. But, when other questions came up, as to whether a particular authority from this or that self-styled power should be recognized, our Government frowned upon it, and would not recognize it. With regard to Captain Aury, who styled himself Generalissimo of the Floridas, or something of that kind, when Florida was a Spanish province, our Courts said: "We do not know anything about this—his commissions are good for nothing here—our Government has not recognized any such contest or incipient nationality as this." So, too, in another case, where there was an apparent commission from one struggling power, the Court says: Our Government does not recognize that power, and we do not, in giving any rights of war to it; but, the Court says, it appears in the proof that this vessel claims to have had a commission from Buenos Ayres, another contending power; if so, that is a power which our Government recognizes; and the case must go down for further proof on that point.

I confess that, if the views of my learned friends are to prevail, in determining questions of crime and responsibility under the laws and before the Court, and are to be accepted and administered, I do not see that there is any Government at all. For you have every stage of Government; first, Government of right; next a Government in fact; next, a Government trying to make itself a fact; and, next, a Government which the culprit thinks ought to be a fact. Well, if there are all these stages of Government, and all these authorities and protections, which may attend the acts of people all over the world, I do not see but every Court and every Jury must, finally, resolve itself into the great duty of searching the hearts of men, and putting its

sanctions upon pure or guilty secret motives, or notions, or interpretations of right and wrong—a task to which you, gentlemen of the Jury, I take it, feel scarcely adequate.

Now, gentlemen, I have perhaps wearied you a little upon this subject; because it is from some confusion in these ideas,—first, of what the law of nations permits a Government to do, and how it intrudes upon and qualifies the laws of that Government; and, second, upon what the rights are that grow out of civil dissensions, as toward neutral powers,—that some difficulty and obscurity are introduced into this case.

If the Court please, I maintain these propositions, in conformity with the views I have heretofore presented—first, that the law of the land is to determine whether this crime of piracy has been committed, subject only to the province of the Jury in passing upon the facts attending the actual perpetration of the offence; and, second, upon all the questions invoked to qualify, from the public relations of the hostile or contending parties in this controversy, the attitude that this Government holds towards these contending parties, is the attitude that this Court, deriving its authority from this Government, must necessarily hold towards them.

I have argued this matter of the choice and freedom of a Government to say how it will regard these civil dissensions going on in a foreign nation, as if it had some application to this controversy, in which we are the nation, and this Court is the Court of this nation.

But, gentlemen, the moment I have stated that, you will see that there is not the least pretence that there is any dispensing power in the Court, or that there has been any dispensing power exercised by our Government, or that there has been any pardon, or any amnesty, or any proclamation, saving from the results of crime against our laws, any person engaged in these hostilities, who at any time has owed allegiance and obedience to the Government of the United

States. Therefore, here we stand, really extricated from the confusion, and from all the wideness of controversy and of comment that attends these remote considerations of this case that have been pressed upon your attention as if they were the case itself, on the part of our learned friend.

Now, if the Court please, I shall bestow some particular consideration upon the statute, but I shall think it necessary to add very little to the remarks I have heretofore made to the Court. The 8th section of the statute has been characterized by the learned counsel, and, certainly, with sufficient accuracy, for any purposes of this trial, as limited to the offence of piracy as governed by the law of nations. I do not know that any harm comes from that description, if we do not confuse it with the suggestion that the authority of this Government over the crime is limited to the construction of the law of nations which is expressed in that section of the statute. At all events, as they concede, I believe, that the 8th section is within the constitutional right and power of Congress, under the special clause giving them authority to define and punish piracy, under the law of nations, there is no room for controversy here on the point. When we come to the 9th section, we have two different and quite inconsistent views presented by the different counsel. One of the counsel (I think, Mr. Dukes) insists that the 9th section does not create any additional crime beyond that of piracy as defined in the 8th section, but only robs that crime of piracy of any apparent protection from a commission or authority from any State. But, my friend Mr. Brady contends (and, I confess, according to my notion of the law, with more soundness) that there is an additional crime, which would not be embraced, necessarily, in the crime of piracy or robbery on the high seas—which is the whole purview of the 8th section, and which is in terms repeated in the 9th—and that the additional words, “or any act of hostility against the United States, or any citizens thereof,” create a punish-

able offence, although it may fall short of the completed crime of piracy and robbery, as defined. Now, I concede to my learned friend that the particular case he put of a quarrel between two ships' crews on the high seas, and of an attack by one of the crew of one upon one of the crew of the other with a belaying pin, would not, in my judgment, as an indictable, punishable offence, fall within the 9th section. But, whether I am right or wrong about it, does not impede the argument of the Government, that there are crimes which are in the nature of and up to the completeness of hostile attacks upon vessels or citizens of the United States which would not be piracy, but yet are punishable under the 9th section.

Now, agreeing, thus far, that there is an added offence to the crime of piracy in the 9th section, I am obliged to meet his next proposition, that such additional offence is beyond the constitutional power of Congress, because it is an offence which does not come up to the crime of piracy, and, therefore, exceeds the grant of authority under the particular section of the Constitution which gives to Congress power over the definition and punishment of piracy under the law of nations.

Now, if the Court please, the argument is a very simple one. This 9th section does not profess to carry the power of this Government where alone the principles of the law of nations would justify; that is, to operate upon all the world, so far as the subjects of it—that is, the persons included in its sanctions—are concerned, or so far as the property protected by it is concerned. It is limited to citizens, and limited to hostilities against citizens of the United States, or their property at sea. Now, the authority in respect to this comes to Congress under the provision of the Constitution which gives the regulation of commerce and its control, in regard to which I need not be more particular to your Honors, because they are statutes of every-day enforcement,

and under the highest penalty, too, of the law, such as revolt, mutiny, etc., which have nothing to do with the national considerations of the law of piracy, and nothing to do with the clause of the Constitution which gives to Congress power over the crime of piracy, but rest in the power reposed in Congress to protect the commerce of the United States. So, this is wholly within the general competency of Congress to govern citizens of the United States on the high seas, and to protect the property of citizens on the high seas, although there is no common law of general jurisdiction of Congress on the subject of crimes.

Now, upon this subject there is but one other criticism, and that is—that although the statute is framed with the intent, and its language covers the purpose, of prohibiting any defence or protection being set up under an assumed or supposed authority from any foreign Government, State, or Prince, or from any person, yet the particular authority which is averred in the indictment and produced in proof, if you take it in the sense that we give to it, is not within the purview of the statute, and, if you take it in any other sense, is not proved; and that thus a variance arises between the indictment and the proof, because the proof goes so far as to remove from under the statute the four defendants who would otherwise be amenable as citizens, by making the Government foreign, and making them foreign citizens.

Now, to take up one branch of this at a time, I do not care at all whether the Government of the United States, when they passed this law, anticipated that there would ever be an occurrence which should give shape to such a commission as this, from either a person or an authority that emanated from what was or ever had been a part or a citizen of the United States. If these new occurrences here have produced new relations—(and that is the entire argument of my learned friends, for, if they have produced no new relations, what have we to do with any of these discus-

sions?)—if they have produced new relations, perfect or imperfect, effectual or ineffectual, to this or that extent, why then, if these new relations and attitude have brought this matter within the purview of a statute of the United States which was framed to meet all relations that might arise at any time, they come within its predicament, and the argument seems to me to amount to nothing. It will not be pretended that the 9th section of this statute can only be enforced as to Powers in existence at the time it was passed. Whenever a new Power or new authority is set forth as a protection to the crime of piracy, the 9th section of the statute says: "Well, we do not know or care anything about what the law of nations says about your protection, or your authority—we say that no citizen of the United States, depredating against our commerce, shall set up any authority to meet the justice of our criminal law." Well, now, that the statute has said; and we have averred and proved the commission such as it is. It is either the commission of a foreign Prince, or State, or it is an authority from some person. We do not recognize it as from a foreign State or Prince. Indeed, Mr. Davis does not call himself a Prince, and we do not recognize the Confederate States as a nation or State, in any relation. Therefore if we would prove this authority under our law, we must aver it as it is, coming from an individual who was once a citizen of the United States, and still is, as the law decides, a citizen of the United States. Whatever part or pretension of authority he assumes, and whatever real fact and substance there may be to his power, it is, in the eye of the law, nothing. It is not provable, and it is not proved. Now, as to the right of Congress to include the additional crime, under the authority given to it to punish piracy according to the law of nations, my learned friend contends that this statute is limited by that authority, and is, as respects anybody within its purview, unconstitutional, and that, although a particular act may be within the description of the statute,

so far as regards hostility, it is not piracy. On that subject I refer your Honors to a very brief proposition contained in the case of *The United States vs. Pirates* (5 Wheaton, 202):

“And if the laws of the United States declare those acts of piracy in a citizen, when committed on a citizen, which would be only belligerent acts when committed on others, there can be no reason why such laws should not be enforced. For this purpose the 9th section of the Act of 1790 appears to have been passed. And it would be difficult to induce this Court to render null the provisions of that clause, by deciding either that one who takes a commission under a foreign power, can no longer be deemed a citizen, or that all acts committed under such a commission, must be adjudged belligerent, and not piratical acts.”

I would also refer to the case of *The Invincible*, to which my learned friend called the attention of the Court, in the opinion of the late Attorney General, Mr. Butler. It is to be found in the 3rd volume of the *Opinions of the Attorneys General*, page 120. My learned friend cited this case in reference to the proposition that persons holding a commission (as I understood him) should not be treated as pirates, under the law of nations, by reason of any particular views or opinions of our Government. I refer to that part of the opinion where he says: “A Texan armed schooner cannot be treated as a pirate under the Act of April 30th, 1790, for capturing an American merchant-man, on the alleged ground that she was laden with provisions, stores, and munitions of war for the use of the army of Mexico, with the Government of which Texas, at the time, was in a state of revolt and civil war.”

Now, undoubtedly, Mr. Butler does here hold that, by the law of nations, in a controversy between revolting Colonies and the parent State, where our Government recognizes a state of war as existing, a privateer cannot be treated as a pirate. But we will come to the opinion of the At-

torney-General on the other proposition we contend for—that is, in support of the 9th section of the statute, as far as it would have exposed citizens of the United States to the penalty of piracy:

“In answer to this question, I have the honor to state that, in my opinion, the capture of the American ship *Pocket* can in no view of it be deemed an act of piracy, *unless it shall appear that the principal actors in the capture were citizens of the United States.* The ninth section of the Crimes Act of 30th April, 1790, declares ‘that if any citizen shall commit any piracy or robbery, or any act of hostility against the United States, or any citizen thereof, upon the high seas, under color of any commission from any foreign Prince, or State, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon and robber, and on being thereof convicted, shall suffer death.’ This provision is yet in force, and *should it be found that any of those who participated in the capture of the ‘Pocket’ are American citizens, the flag and commission of the Government of Texas would not protect them from the charge of piracy.*”

It will be seen here, that the condition of belligerents will not protect our citizens from aggressions against our commerce; and there is no place for my learned friends to put this authority, and this assumed belligerent power and right, on any footing that must not make it, either actually or in pretence, at least, proceed from a separate contending power. And, if they say (as, in one of their points substantially is said) that the 9th section cannot apply, because the alleged authority is not from a foreign State, or a foreign personage, but from a personage of our own country,—why, then, we are thrown back at once to the 8th section entirely, and there is either no pretence of authority at all, and it is just like arguing that the pirate accused was authorized by the merchant owner of a vessel in South street to commit piracy,



or we are put in the position, which is unquestionably the true one, that the 9th section was intended to cover all possible although unimagined forms in which the justice of the country could be attempted to be impeded under the claim of authority.

Now, gentlemen, if the Court please, I come to a consideration of the political theories or views on which these prisoners are sought to be protected against the penalties of this law. In that argument, as in my argument, it must be assumed that these penalties, but for those protections, would be visited upon them; for we are not to be drawn hither and thither by this inquiry, and to have it said, at one time, that the crime itself, in its own nature, is not proved, and, at another time, that, if it be proved, these are defences. I have said all I need to say, and all I should say, about the crime itself. The law of the case on that point will be given to you by the Court, and, if it should be, as I suppose it must, in accordance with that laid down by the Court in the Circuit of Pennsylvania, then, as my learned friend Mr. Brady has said of that, that he could not see how the Jury could find any verdict but guilty, it necessarily follows, if that is a sound view of the law, that you cannot find any other verdict but guilty. I proceed, therefore, to consider these other defences which grow out of the particular circumstances of the piracy.

Now, there are, as I suggested, three views in which this subject of the license, or authority, or protection against our criminal laws in favor of these prisoners, is urged, from their connection with particular occurrences disclosed in the evidence. One is, that they are privateers; but I have shown you that, to be privateers, their commission must come from an independent nation, or from an incipient nation, which our Government recognizes as such. Therefore, they fail entirely to occupy that explicit and clear position, under the law of the land and the law of nations. But, as they say,

they are privateers either of a nation or a Power that exists, as the phrase is, *de jure*,—that has a right, the same as we, or England, or France,—or a Power that has had sufficient force and strength to establish itself, as matter of fact. Without considering the question of right, as recognized under the system of nations, they contend, and with a great deal of force and earnestness, in the impression of their views upon the Jury, and great skill and discretion in handling the matter,—they contend that there is a state of civil war in this country, and that a state of civil war gives to all nations engaged in it, against the Government with which they are warring, rights of impunity, of protection, of respect, of regard, of courtesy, which belong to the laws of war; and that, without caring to say whether they are a Government, or ever will be a Government, so long as they fight they cannot be punished.

That is the proposition—there is nothing else to it. They come down from the region of *de jure* Government and *de facto* Government, and have nothing to prove but the rage of war on the part of rebels, in force enough to be called war. Then they say that, by their own act, they are liberated from the laws, and from their duty to the laws, which would otherwise, they admit, have sway over them, and against which they have not as yet prevailed. That is the proposition.

Another proposition, on which they put themselves, is that whatever may be the law, and whatever the extent of the facts, if any of these persons believed that there was a state of war, rightful to be recognized, and believed, in good faith, that they were fighting against the Government of the United States, they had a right to seize the property of United States' citizens; and that, if they believed that they constituted part of a force co-operating, in any form or effect, with the military power which has risen up against the United States of America, then, so long as they had that

opinion, they, by their own act, and their own construction of their own act, impose the law upon this Government, and upon this Bench, and upon this Jury, and compel you to say to them that if, in taking in a manner which would have been robbery, this vessel, the *Joseph*, they were also fighting against the United States of America, they have not committed the crime of piracy.

Now, if the Court please, and gentlemen of the Jury, let us, before we explore and dissect these propositions,—before we discover how utterly subversive they are of any notions of Government, of fixity in the interpretation of the law, or certainty in the enforcement of it,—let us see what you will fairly consider as being proved, as matter of fact, concerning the condition of affairs in this country. Let us see what legal discrimination or description of this state of things is likely to be significant and instructive, in determining the power and authority of the Government, and the responsibility of these defendants. They began with an Ordinance of South Carolina, passed on the 20th of December of last year, which, in form and substance, simply annulled the Ordinance of that State, with which, as they say, they ratified or accepted the Constitution of the United States. They then went on with similar proceedings on the part of the States of Georgia, Alabama, Mississippi, and Florida, showing the establishment and adoption of a Provisional Constitution, by which they constituted and called themselves the Confederate States of America. They proved, then, the organization of the Government, the election of Mr. Davis and Mr. Stephens as President and Vice-President, and the appointment of Secretaries of War, and of the Navy, and other portions of the civil establishment. They proved, then, the occurrences at Fort Sumter, and gave particular evidence of the original acts at Charleston—the firing on the *Star of the West*, and the correspondence which then took place between Major Anderson and the Governor

of South Carolina. They then went on to prove the evacuation of Fort Moultrie; the storming of Fort Sumter; the Proclamation of the President of the United States, of the 15th of April, calling for 75,000 troops; Mr. Davis's Proclamation, of the 17th of April, inviting privateers; and then the President's Proclamation, of the 19th of April, denouncing the punishment of piracy against privateers, and putting under blockade the coasts of the revolted States. The laws about privateering passed by what is called the Confederate Government, have, also, been read to you; and this seems to complete the documentary, and constitutional, and statutory proceedings in that disaffected portion of the country. But what do the prisoners prove further? That an actual military conflict and collision commenced, has proceeded, and is now raging in this country, wherein we find, not one section of the country engaged in a military contest with another section of the country—not two contending factions, in the phrase of Vattel, dividing the nation for the sake of national power—but the Government of the United States, still standing, without the diminution of one tittle of its power and dignity—without the displacement or disturbance of a single function of its executive, of its legislative, of its judicial establishments—without the disturbance or the defection of its army or its navy—without any displacement in or among the nations of the world—without any retreat, on its part, or any repulsion, on the part of any force whatever, from its general control over the affairs of the nation, over all its relations to foreign States, over the high seas, and over every part of the United States themselves, in their whole length and breadth, except just so far as military occupation and military contest have controlled the peaceful maintenance of the authority and laws of the Government.

Now, this may be conceded for all sides of the controversy. I do not claim any more than these proofs show, and what

we all know to be true; and I am but fair in conceding that they do show all the proportions and extent which make up a contest by the forces of the nation, as a nation, against an armed array, with all the form and circumstances, and with a number and strength, which make up military aggression and military attack on the part of these revolting or disaffected communities or people.

Now, some observations have been made, at various stages of this argument, of the course the Government has taken in its declaration of a blockade, and in its seizure of prizes by its armed vessels, and its bringing them before the Prize Courts; and my learned friend, Mr. Brady, has done me the favor to allude to some particular occasion on which I, on behalf of the Government, in the Admiralty Court, have contended for certain principles, which would lead to the judicial confiscation of prizes, under the law of the land, or under the law of nations adopted and enforced as part of the law of the land. Well, now, gentlemen, I understand and agree that, for certain purposes, there is a condition of war which forces itself on the attention and duty of Governments, and calls on them to exert the power and force of war for their protection and maintenance. And I have had occasion to contend—and the learned Courts have decided—that this nation, undertaking to suppress an armed military rebellion, which arrays itself, by land and by sea, in the forms of naval and military attack, has a right to exert—under the necessary principles which control and require the action of a nation for its own preservation, in these circumstances of danger and of peril—not only the usual magisterial force of the country—not only the usual criminal laws—not only such civil posses or aids to the officers of the law as may be obtained for their assistance—but to take the army and the navy, the strength and manhood of the nation, which it can rally around it, and in every form, and by every authority, human and divine, suppress and reduce a revolt, a rebellion,

a treason, that seeks to overthrow this Government in, at least, a large portion of its territory, and among a large portion of its people. In doing so, it may resort—as it has resorted—to the method of a warlike blockade, which, by mere force of naval obstruction, closes the harbors of the disaffected portion of the country against all commerce. Having done that, it has a right, in its Admiralty Courts, to adjudicate upon and condemn as prizes, under the laws of blockade, all vessels that shall seek to violate the blockade. Nor, gentlemen, have I ever denied—nor shall I here deny—that, when the proportions of a civil dissension, or controversy, come to the port and dignity of war, good sense and common intelligence require the Government to recognize it as a question of fact, according to the actual circumstances of the case, and to act accordingly. I, therefore, have no difficulty in conceding that, outside of any question of law and right—outside of any question as to whether there is a Government down there, whether nominal or real, or that can be described as having any consistency of any kind, under our law and our Government—there is prevailing in this country a controversy, which is carried on by the methods, and which has the proportions and extent, of what we call war.

War, gentlemen, as distinguished from peace, is so distinguished by this proposition—that it is a condition in which force on one side and force on the other are the means used in the actual prosecution of the controversy. Now, gentlemen, if the Court please, I believe that that is all that can be claimed, and all that has been claimed, on behalf of these prisoners, in regard to the actual facts, and the condition of things in this country. And I admit that, if this Government of ours were not a party to this controversy,—if it looked on it from the outside, as England and France have done,—our Government would have had the full right to treat these contending parties, in its Courts and before

its laws, as belligerents, engaged in hostilities, as it would have had an equal right to take the opposite course. Which course it would have taken, I neither know, nor should you require to know.

But, I answer to the whole of this, if the Court please, that it is a war in which the Government recognizes no right whatever on the part of the persons with whom it is contending; and that, in the eye of the law, as well as in the eye of reason and sound political morality, every person who has, from the beginning of the first act of levying war against the United States until now, taken part in this war, actively and effectively, in any form—who has adhered to the rebels—who has given aid, information, or help of any kind, wherever he lives, whether he sends it from New Hampshire or New York, from Wisconsin or Baltimore—whether he be found within or without the armed lines—is, in his own overt actions, or open espousal of the side of this warring power, against the Government of the United States, a traitor and a rebel. I do not know that there is any proposition whatever, of law, or any authority whatever, that has been adduced by my learned friends, in which they will claim, as matter of law, that they are *not* rebels. I invited the attention of my learned friends, as I purposed to call that of the Court, to the fact, that the difficulty about all this business was, that the plea of authority or of war, which these prisoners interposed against the crime of piracy, was nothing but a plea of their implication in treason. I would like to hear a sober and solemn proposition from any lawyer, that a Government, as matter of law, and a Court, as matter of law, cannot proceed on an infraction of a law against violence either to person or property, instead of proceeding on an indictment for treason. The facts proved must, of course, maintain the personal crime; and there are many degrees of treason, or facts of treason, which do not include violent crime. But, to say that a person who has acted as a rebel cannot

be indicted as an assassin, or that a man who has acted, on the high seas, as a pirate, if our statutes so pronounce him, cannot be indicted, tried and convicted as a pirate, because he could plead, as the shield of his piracy, that he committed it as part of his treason, is, to my apprehension, entirely new, and inconsistent with the first principles of justice.

Now, this very statute of piracy is really a general Crimes Act. The first section is:

"If any person or persons owing allegiance to the United States of America shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States, or elsewhere, and shall be thereof convicted," "such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death."

Now, you will observe that treason is not a defence against piracy; nor is good faith in treason a defence against treason, or a defence against piracy. What would be the posture of these prisoners, if, instead of being indicted for piracy, they were indicted for treason? Should we then hear anything about this notion that there was a war raging, and that they were a party engaged in the war? Why, that is the very definition of treason. Against whom is the war? Against the United States of America. Did you owe allegiance to the United States of America? Yes, the citizens did; and I need not say to you, gentlemen, that those residents who are not citizens owe allegiance. There is no dispute about that. Those foreigners who are living here unnaturalized are just as much guilty of treason, if they act treasonably against the Government, as any of our own citizens can be. That is the law of England, the law of treason, the necessary law of civilized communities. If we are hospitable, if we make no distinction, as we do not, in this country, between citizens, and foreigners resident here and protected by our laws, it is very clear we cannot make any distinction when we come to the question of who are



faithful to the laws. So, therefore, if they were indicted for treason, what would become of all of this defence? It would be simply a confession in open Court that they were guilty of treason. Well, then, if they fell back on the proposition,—“We thought, in our consciences and judgments, that either these States had a right to secede, or that they had a right to carry on a revolution; that they were oppressed, and were entitled to assert themselves against an oppressive Government, and we, in good faith, and with a fair expectation of success, entered into it,”—what would become of them? The answer would be, “Good faith in your attempt to overthrow the Government does not excuse you from responsibility for the crime of attempting it.” Our statute is made for the purpose of protecting our Government against efforts made, in good faith or in bad faith, for its overthrow.

And now, in this connection, gentlemen, as your attention, as well as that of the Court, has been repeatedly called to it, let me advert again to the citation from that enlightened public writer, Vattel, who has done as much, perhaps, as our learned friends have suggested, to place on a sure foundation the amelioration of the law of nations in time of war, and their intercourse in time of peace, as any writer and thinker whom our race has produced. You remember, that he asks—How shall it be, when two contending factions divide a State, in all the forms and extent of civil war—what shall be the right and what the duty of a sovereign in this regard? Shall he put himself on the pride of a king, or on the flattery of a courtier, and say, I am still monarch, and will enforce against every one of this multitude engaged in this rebellion the strict penalties of my laws? Vattel reasons, and reasons very properly: You must submit to the principles of humanity and of justice; you must govern your conduct by them, and not proceed to an extermination of your subjects because they have revolted, whether

with or without cause. You must not enforce the sanctions of your Government, or maintain its authority, on methods which would produce a destruction of your people. And you must not further, by insisting, under the enforced circumstances which surround you, on the extreme and logical right of a king, furnish occasion for the contending rebels, who have their moments of success and power, as well as you, to retaliate on your loyal people, victims of their struggle on your behalf, and thrown into the power of your rebellious subjects,—to retaliate, I say, on them the same extreme penalties, without right, without law, but by mere power, which you have exerted under your claim of right.

And now, gentlemen of the Jury, as the Court very well understands, this general reasoning, which should govern the conduct of a Sovereign, or of a Government, against a mere local insurrection, does not touch the question as to whether the law of a nation in which the sovereign presides, and in violation of which the crime of the rebels has been perpetrated, shall be enforced. There has been, certainly in modern times, no occasion when a Sovereign has not drawn, in his discretion, and under the influence of these principles of humanity and justice, this distinction, and has not interposed the shield of his own mercy between the offences of misled and misguided masses of his people and offended laws. We know the difference between law and its condemnation, and mercy and its saving grace; and we know that every Government exercises its discretion. And, I should like to know why these learned counsel, who are seeking to interpose, as a legal defence on the part of a criminal, the principles of policy and mercy which should guide the Government, are disposed to insist that this Government, in its prosecutions and its trials, has shown a disposition to absolve great masses of criminals from the penalties of its laws. I should like to know, when my learned friend Mr. Brady, near the close of his remarks, sug-

gested that there had been no trial for treason, whether this Government, from the first steps in the outbreak, down to the final and extensive rage of the war, has not foreborne to take satisfaction for the wrongs committed against it, and has not been disposed to carry on and sustain the strength of the Government, without bloody sacrifices for its maintenance, and for the offended justice of the land. But it is certainly very strange if, when a Government influenced by those principles of humanity of which Vattel speaks, and which my learned friends so much insist upon, has foreborne, except in signal instances, or, if you please, in single instances that are not signal, to assert the standard of the law's authority and of the Government's right,—that it may be seen that the sword of justice, although kept sheathed for the most part, has yet not rusted in its scabbard, and that the Government is not faithless to itself, or to its laws, its powers, or its duties, in these particular prosecutions that have been carried, one to its conclusion in Philadelphia, and the other to this stage of its progress, here,—it is strange, indeed, that the appeal is to be thrust upon it—"Do not include the masses of the misguided men!" and, when it yields so mercifully to that appeal, and says—"I will limit myself to the least maintenance and assertion of a right," that the answer is to come back: "Why, how execrable—how abominable, to make distinctions of that kind!"

But, gentlemen, the mercy of the Government, as I have said to you, remains after conviction, as well as in its determination not to press numerous trials for treason; but it is an attribute, both in forbearing to try and in forbearing to execute, which is safely left where the precedents that are to shape the authority of law cannot be urged against its exercise. Now, I look upon the conduct and duty of the Government on somewhat larger considerations than have been pressed before you here. The Government, it is said, does not desire the conviction of these men, or, at least,

should not desire it. The Government does not desire the blood of any of its misguided people. The Government—the prosecution—should have no passion, no animosities, in this or in any other case; and our learned friends have done us the favor to say that the case is presented to you as the law should require it to be; that you, and all, are unaffected and unimpeded in your judgment; and that, with a full hearing of what could be said on the part of these criminals, you have the case candidly and openly before you. Now, gentlemen, the Government, although having a large measure of discretion, has no right, in a country where the Government is one wholly of law, to repeal the criminal law, and no right to leave it without presenting it to the observation, the understanding, and the recognition of all its citizens, whether in rebellion or not, in its majesty, in its might, and in its impartiality. The Government has behind it the people, and it has behind it all the great forces which are breathing on our agitated society, all the strong passions, all the deep emotions, all the powerful convictions, which impress the loyal people of this country as to the outrage, as to the wickedness, as to the perils of this great rebellion. Do you not recollect how, when the proclamation of Mr. Davis invited marauders to prey upon our commerce, from whatever quarter and from whatever motives—(patriotism and duty not being requisite before they would be received)—the cry of the wounded sensibilities of a great commercial people burst upon this whole scene of conflict? What was there that as a nation we had more to be proud of, more to be glad for in our history, than our flag? To think that in an early stage of what was claimed to be first a constitutional, and then a peaceful, and then a deliberate political agitation and maintenance of right, this last extreme act, the arming of private persons against private property on the sea, was appealed to before even a force was drawn on the field on behalf of the United States of America! The

proclamation of the President was but two days old when privateers were invited to rush to the standard. The indignation of the community, the sense of outrage and hatred was so severe and so strong, that at that time, if the sentiment of the people had been consulted, it would have found a true expression in what was asserted in the newspapers, in public speeches, in private conversations—that the duty of every merchantman and of every armed vessel of the country, which arrested any of these so-called privateers, under this new commission, without a nation and without authority, was to treat them as pirates caught in the act, and execute them at the yard-arm by a summary justice. Well, I need not say to you, gentlemen, that I am sure you and I and all of us would have had occasion to regret, in every sense, as wrong, as violent, as unnecessary, and, therefore, as wholly unjustifiable, on the part of a powerful nation like ourselves, any such rash execution of the penalties of the law of nations, and of the law of the land, while our Government had power on the sea, had authority on the land, had Courts and laws and juries under its authority to inquire and look into the transaction.

The public passions on this subject being all cool at this time, after an interval of four months or more from the arrest, we are here trying this case. Yet my learned friends can find complaint against the mercy of the Government and its justice, that it brings any prosecution; and great complaint is made before you, without the least ground or cause, as it seems to me, that the prosecution is pressed in a time of war, when the sentiments of the community are supposed to be inflamed.

Well, gentlemen, what is the duty of Government, when it has brought in prisoners arrested on the high seas, but to deliver them promptly to the civil authorities, as was done in this case—and then, in the language of the Constitution, which secures the right to them, to give them a speedy and

impartial trial? That it is impartial, they all confess. How speedy is it? They say, they regret that it proceeds in time of war. Surely, our learned friends do not wish to be understood as having had denied to them in this Court any application which they have made for postponement. The promptness of the judicial and prosecuting authorities here had produced this indictment in the month of June, I believe, the very month in which the prisoners were arrested, or certainly early in July; and then the Government was ready to proceed with the trial, so far as I am advised. But, at any rate, an application—a very proper and necessary application—was made by our learned friends, that the trial should be postponed till, I believe, the very day on which it was brought on. That application was not objected to, was acquiesced in, and the time was fixed, and no further suggestion was made that the prisoners desired further delay; and, if the Government had undertaken to ask for further delay, on the ground of being unprepared, there was no fact to sustain any such application. If it was the wish of the prisoners, or for their convenience, that there should be further delay, it was for them to suggest it. But, being entitled by the Constitution to a speedy as well as an impartial trial, and the day being fixed by themselves on which they would be ready, and they being considered ready, and no difficulty or embarrassment in the way of proof having been suggested on the part of the Government, it seems to me very strange that this regret should be expressed, unless it should take that form of regret which all of us participate in, that the war is not over. That, I agree, is a subject of regret. But how there has ever been any pressure, or any—the least—exercise of authority adverse to their wishes in this matter, it is very difficult for me to understand.

Now, gentlemen, I approach a part of this discussion which I confess I would gladly decline. I have not the least ob-

jection—no one, I am sure, can feel the least objection—to the privilege or supposed duty of counsel, who are defending prisoners on a grave charge,—certainly not in a case which includes, as a possible result, the penalty of their clients' lives,—to go into all the inquiries, discussions and arguments, however extensive, varied, or remote, that can affect the judgment of the Jury, properly or fairly, or that can rightly be invoked. But, I confess that, looking at the very interesting, able, extensive and numerous arguments, theories and illustrations, that have been presented in succession by, I think, in one form or another, seven counsel for these prisoners, as the introduction into a judicial forum, and before a Jury, of inquiries concerning the theories of Government, the course of politics, the occasion of strife on one side or the other, within the region of politics and the region of peace, in any portion of the great communities that composed this powerful nation—in that point of view, I aver they seem to me very little inviting and instructive, as they certainly are extremely unusual in forensic discussions. Certainly, gentlemen of the Jury, we must conceive some starting point somewhere in the stability of human affairs, as they are entrusted to the control and defence of human Governments. But, in the very persistent and resolute views of the learned counsel upon this point—first on the right of secession as constitutional; second, if not constitutional, as being supposed by somebody to be constitutional; third, on the right of revolution as existing on the part of a people oppressed, or deeming themselves oppressed, to try their strength in the overthrow of the subsisting Government; fourth, on the right to press the discontents inside of civil war; and then finally and at last, that whoever thinks the Government oppresses him, or thinks that a better Government would suit his case, has not only the right to try the venture, but that, unsuccessful, or at any stage of the effort, his right becomes so complete that the

Government must and should surrender at once and to every attempt—I see only what is equivalent to a subversion of Government, and to saying that the right of revolution, in substance and in fact, involves the right of Government in the first place, and its duty in the second place, to surrender to the revolutionist, and to treat him as having overthrown it in point of law, and in contemplation of its duty. That is a proposition which I cannot understand.

Nevertheless, gentlemen, these subjects have been so extensively opened, and in so many points attacks have been made upon what seems to me not only the very vital structure and necessary support of this, our Government, but the very necessary and indispensable support of any Government whatever, and we have been so distinctly challenged, both on the ground of an absolute right to overthrow this Government, whenever any State thinks fit—and, next, upon the clear right, on general principles of human equity, of each State to raise itself against any Government with which it is dissatisfied—and upon the general right of conscience—as well as on the complete support by what has been assumed to have been the parallel case, on all those principles, of the conduct of the Colonies which became the United States of America and established our Government—that I shall find it necessary, in the discharge of my duty, to say something, however briefly, on that subject. Now, gentlemen, these are novel discussions in a Court of Justice, within the United States of America. We have talked about the oppressions of other nations, and rejoiced in our exemption from all of them, under the free, and benignant, and powerful Government which was, by the favor of Providence, established by the wisdom, and courage, and virtue of our ancestors. We had, for more than two generations, reposed under the shadow of our all-protecting Government, with the same conscious security as under the firmament of the heavens. We knew, to be sure, that for all that made life



hopeful and valuable—for all that made life possible—we depended upon the all-protecting power, and the continued favor of Divine Providence. We knew, just as well, that, without civil society, without equal and benignant laws, without the administration of justice, without the maintenance of commerce, without a suitable Government, without a powerful nationality, all the motives and springs of human exertion and labor would be dried up at their source. But we felt no more secure in the Divine promise that “summer and winter, seed-time and harvest,” should not cease, than we did in the permanent endurance of that great fabric established by the wisdom and the courage of a renowned ancestry, to be the habitation of liberty and justice for us and our children to every generation. We felt no solicitude whatever that this great structure of our constitutional liberties should pass away as a scroll, or its firm power crumble in the dust. But, by the actual circumstances of our situation,—and, if not by them, certainly by the destructive theories which are presented for your consideration,—it becomes necessary for us, as citizens, and, in the judgment at least of the learned counsel, for these prisoners, for you, and for this learned Court, in the conduct of this trial, and in the disposition of the issue of “guilty” or “not guilty” as to these prisoners, to pay some attention to these considerations. If, in the order of this discussion, gentlemen, I should not seem to follow in any degree, or even to include by name, many of the propositions, of the distinctions, and of the arguments which our learned friends have pressed against the whole solidity, the whole character, the whole permanence, the whole strength of our Government, I yet think you will find that I have included the principal ideas they have advanced, and have commented upon the views that seem to us—at least so far as we think them to be at all connected with this case—suitable to be considered.

Now, gentlemen, let us start with this business where our

friends, in their argument, where many of the philosophers, and partisans, and statesmen of the Southern people, have found many of their grounds of support. Let us start with this very subject of the American Revolution, with the condition that we were in, and with the place that we found ourselves raised to, among the nations of the earth, as the result of that great transaction in the affairs of men. What were we before the Revolution commenced? Was any one of the original thirteen States out of which our nation was made, and which, previous to the Revolution, were Colonies of Great Britain—was any one of them an independent nation at the time they all slumbered under the protection of the British Crown? Why, not only had they not the least pretension to be a nation, any of them, but they had scarcely the position of a thoroughly incorporated part of the great nation of England. Now, how did they stand towards the British power, and under what motives of dignity, and importance, and necessity did they undertake their severance from the parent country? With all their history of colonization, the settlement of their different charters, and the changes they went through, I will not detain you. For general purposes, we all know enough, and I, certainly not more than the rest of you. This, however, was their condition. The population were all subjects of the British Crown; and they all had forms of local Government which they had derived from the British Crown; and they claimed and possessed, as I suppose, all the civil and political rights of Englishmen. They were not subject to any despotic power, but claimed and possessed that right to a share in the Government, which was the privilege of Englishmen, and under which they protected themselves against the encroachment of the Crown. But, in England, as you know, the monarch was attended by his Houses of Parliament, and all the power of the Government was controlled by the people, through their representatives in the House of Com-

mons. And how? Why, because, although the King had prerogatives, executive authority, a vast degree of pomp and wealth, and of strength, yet the people, represented in the House of Commons, by controlling the question of taxation, held all the wealth of the kingdom—the power of the purse, as it was described—and without supplies, without money for the army, for the navy, for all the purposes of Government, what authority, actual and effective, had the Crown of England? These were the rights of Englishmen; these made them a free people, not subject to despotic power. They cherished it and loved it. Now, what relation did these Colonies, becoming off-shoots from the great fabric of the national frame of England, bring with them, and assert, and enjoy here? Why, the king was their king, just as he was the king of the people whom they left in England, but they had their legislatures here, which made their laws for them in Massachusetts, in Connecticut, in Virginia, in South Carolina, and in the rest of these provinces; and among these laws, in the power of law-making, they had asserted, and possessed, and enjoyed the right of laying taxes for the expenses and charges of their Government. They formed no part of the Parliament of England, but, as the subjects of England within the four seas were obedient to the king, and were represented in the Parliament that made laws for them, the Colonies of America were subject to the king, but had local legislatures to pass laws, raise and levy taxes, and graduate the expenses and contributions which they would bear.

Now, gentlemen, it is quite true that the local legislatures were subject to the revision, as to their statutes, to a certain extent, of the sovereign power of England. The king had the veto power—as he had the veto power over Acts of Parliament—the power of revision—and other powers, as may have been the casual outgrowth of the forms of different charters. In an evil hour—as these Colonies, from being

poor, despised, and feeble communities, gained a strength and numbers that attracted the attention of the Crown of England, as important and productive communities, capable of being taxed—the Government undertook to assert, as the principle of the Constitution of England, that the king and Parliament, sitting in London, could tax as they pleased, when they pleased, and in the form, and on the subjects, and to the amount, they pleased, the free people of these Colonies.

Now, you will understand, there was not an incidental, a casual, a limited subject of controversy, of right, of danger, but there was an attack upon the first principles of English liberty, which prevented the English people from being the subjects of a despot, and an attempt to make us subject to a despotic Government, in which we took no share, and in which we had no control of the power of the purse. What matter did it make to us that, instead of there being a despotic authority, in which we had no share or representation of vote or voice, exercised by the king alone, it was exercised by the king and Parliament? They were both of them powers of Government that were away from us, and in which we had no share; and we, then, forewarned by the voices of the great statesmen whose sentiments have been read to you, saw in time that, whatever might be said or thought of the particular exercise of authority, the proposition was that we were not entitled to the privilege and freedom of Englishmen, but that the power was confined to those who resided within the four seas—within the islands that made up that Kingdom—and that we were provinces which their king and their Parliament governed. Therefore, you may call it a question of taxation, and my friend may call it “a question of three pence a pound on tea;” but it was the proposition that the power of the purse, in this country, resided in England. We had not been accustomed to it. We did not believe in it. And our first revolutionary act

was to fight for our rights as Englishmen (subject to the King, whose power we admitted), and to assert the rights of our local legislature in the overthrow of this usurpation of Parliament. Now, of the course which we took before we resorted to the violence and vehemence of war, I shall have hereafter occasion to present you, very briefly and conclusively, a condensed recital; but this notion, that we here claimed any right to rise up against a Government that was in accordance with our rights, and was such as we had made it, and as we enjoyed it, equally with all others over whom it was exercised—which lies at the bottom of the revolt in this country—had not the least place, or the opportunity of a place, in our relations with England. We expected and desired, as the correspondence of Washington shows—as some of the observations of Hamilton, I think, read in your presence by the learned counsel, show—as the records of history show—we expected to establish security for ourselves under the British Crown, and as a part of the British Empire, and to maintain the right of Englishmen, to wit, the right of legislation and taxation where we were represented. But the parent Government, against the voice and counsels of such statesmen as Burke, and the warnings of such powerful champions of liberty as Chatham, undertook to insist, upon the extreme logic of their Constitution, that we were British subjects, and that the king and Parliament governed all British subjects; and they had a theory, I believe, that we were represented in Parliament, as one English jurist put it, in the fact that all the grants in all the Colonies were, under the force of English law, “to have and to hold as the Manor of East Greenwich,” and that, as the Manor of East Greenwich was represented in Parliament, all this people were represented. But this did not suit our notions. The lawyers of this country, the Judges of this country and many of the lawyers of England, as mere matter of strict legal right, held that the American

view of the Constitution of England, and of the rights of Englishmen who enjoy it, was the true one. But, at any rate, it was not upon an irritation about public sentiment; nor was it upon the pressure of public taxes; nor because we did not constitute a majority of Parliament; nor anything of that kind; but it was on clear criteria of whether we were slaves, as Hamilton presents it, or part of the free people of a Government. We, therefore, by degrees, and somewhat unconscious, perhaps, of our own enlightened progress, but yet wisely, fortunately, prosperously, determined upon our independence, as the necessary means of securing those rights which were denied to us under the Constitution of our country.

Now, there was not the least pretence of the right of a people to overthrow a Government because they so desire—which seems to be the proposition here—because they think they do not like it—and because there are some points or difficulties in its working that they would like to have adjusted. No; it was on the mere proposition that the working of the administration in England was converting us into subjects, not of the Crown, with the rights of Englishmen, but subjects of the despotic power of Parliament and the King of England. Now, how did we go to work, and what was the result of that Revolution? In the first place, did we ever become *thirteen* nations? Was Massachusetts a nation? Was South Carolina a nation? Did either of them ever declare its independence, or ever engage in a war, by itself and of itself, against England, to accomplish its independence? No, never; the first and preliminary step before independence was union. The circumstances of the Colonies, we may well believe, made it absolutely necessary that they should settle beforehand the question of whether they could combine themselves into one effectual, national force, to contend with England, before they undertook to fight her. It was pretty plain that Massachusetts could not conquer England, or its own independence, and that Vir-

ginia could not do so, and that the New England States alone could not do it, and that the Southern States alone could not do it. It was quite plain that New York, Pennsylvania and New Jersey, alone, could not do it; and, therefore, in the very womb, as it were, and preceding our birth as a nation, we were articulated together into the frame of one people, one community, one nationality. Now, however imperfectly, and however clumsily, and however unsuitably we were first connected, and however necessary and serious the changes which substituted for that inchoate shape of nationality the complete, firm, noble and perfect structure which made us one people as the United States of America, yet you will find, in all the documents, and in all the history, that there was a United States of America, in some form represented, before there was anything like a separation, on the part of any of the Colonies, from the parent country, except in these discontents, and these efforts at an assertion of our liberties, which had a local origin.

The great part of the argument of my learned friend rests upon the fact that these States were nations, each one of them, once upon a time; and, that, having made for themselves this Government, they have remained nations, in it and under it, ever since, subject only to the Confederate authority, in the terms of a certain instrument called a compact, and with the reserved right of nationality ready, at all times, to spring forth and manifest itself in complete separation of any one of the States from the rest. And I find, strangely enough, in the argument as well of the promoters of these political movements at the South as in the voice of my learned friends who have commented on this subject, a reference to the early diplomacy of the United States, as indicative of the fact that they were separate and independent communities—regarded as such by the contracting Powers into connection with whom they were brought by their treaties and conventions, and, more particularly, in the

definitive treaty whereby their independence was recognized by Great Britain. Now, if the Court please, both upon the point (if it can be called a point, connected with your judicial inquiry) that these Colonies were formed into a Union before they secured their national independence, and that there was no moment of time wherein they were not included, either as United Colonies, under the parental protection of Great Britain, or as united in a struggling Provisional Government, or in the perfect Government of the Confederation, and, finally, under the present Constitution—I apprehend that there can be no doubt that our diplomacy, commencing, in 1778, with the Treaty of Alliance with France, contains the same enumeration of States that is so much relied upon by the reasoners for independent nationality on the part of all the States. In the preamble to the Treaty, found at page 6 of the 8th volume of the Statutes at Large, the language was: “The Most Christian King and the United States of North America, to wit, New Hampshire, etc., having this day concluded,” etc. The United States are here treated as a strictly single power, with whom his Most Christian Majesty comes into league; and the credentials or ratifications pursued the same form. The Treaty of Commerce with the same nation, made at the same time, follows the same idea; and the Treaty with the Netherlands, made in 1782, contains the same enumeration of the States, and speaks of each of the contracting parties as “being ‘countries.’” The Convention with the Netherlands, on page 50 of the same volume, and which was a part of the same diplomatic arrangement, and made at the same time, speaks, in Article 1, of the vessels of the “two nations.” Now, the only argument of my learned friends, on the two treaties with Great Britain, of November, 1782, and September, 1783, is, that they are an agreement between England and the thirteen nations; and it is founded upon the fact, that the United States of America, after being described



as such, are enumerated under a "viz." as being so many provinces. Now, the 5th and 6th articles of that Convention of 1782 with the Netherlands speak of "the vessels of war and privateers of one and of the other of the two nations." So that, pending the Revolution, we certainly, in the only acts of nationality that were possible for a contending power, set ourselves forth as only one nation, and were so recognized. And the same views are derivable from the language of the Provisional Treaty with Great Britain of November, 1782, and of the Definitive Treaty of Peace with Great Britain of September, 1783, which Treaties are to be found at pages 54 and 80 of the same 8th volume. The Preamble to the latter Treaty recites:

"It having pleased the Divine Providence to dispose the hearts of the most serene and most potent Prince George the Third, &c., and of the United States of America to forget all past misunderstandings and differences that have unhappily interrupted the good correspondence and friendship, which they mutually wish to restore; and to establish such a beneficial and satisfactory intercourse *between the two countries, &c.*"

And then comes the 1st article, which is identical in language with the Treaty with the Netherlands, of 1782: "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, etc., to be free, sovereign and independent States."

The United States had previously, in the Treaty, been spoken of as one country, and the language I have just quoted is only a statement of the provinces of which they were composed; for, we all know, as matter of history, that there were other British provinces that might have joined in this Revolution, and might, perhaps, have been included in the settlement of peace; and this rendered it suitable and necessary that the provinces whose independence was acknowledged should be specifically described. But, in the

2d article, so far from the separateness of the nationalities with which the convention was made being at all recognized, that important article, which is the one of boundaries, goes on to bound the entire nation as one undivided and integral territory, without the least attention to the divisions between them. It may be very well to say that England was only concerned to have one continuous boundary, coterminous to her own possessions, described, and that that was the object of the geographical bounding; but the entire Western, Eastern, and Southern boundaries are gone through as those of one integral nation. The 3rd article speaks, again, of securing certain rights to the citizens or inhabitants of "both countries." Now, that "country" and "nation," in the language of diplomacy, are descriptive, not of territory, in either case, but of the nationality, admits of no discussion; and yet, I believe that the most substantial of all the citations and of all the propositions from the documentary evidence of the Revolution, which seeks to make out the fact that we came into being as thirteen nations, grows out of this British Treaty, which, in its preamble, takes notice of but one country, called the United States of America, and, then, in recognition of the United States of America, names the States under a "viz."—they being included in the single collective nation before mentioned as the United States.

Now, gentlemen, after the Revolution had completed our independence, how were we left as respects our rights, our interests, our hopes, and our prospects on this very subject of nationality? Why, we were left in this condition—that we always had been accustomed to a parent or general Government, and to a local subordinate administration of our domestic affairs within the limits of our particular provinces. Under the good fortune, as well as the great wisdom which saw that this arrangement—a new one—quite a new one in the affairs of men—now that we were completely independent, and capable of being masters of our whole

Government, both local and general, admitted of none of these discontents and dangers which belonged to our being subject collectively to the dominion of a remote power beyond the seas—under the good fortune and great wisdom of that opportunity, we undertook and determined to establish, and had already established provisionally, a complete Government, which we supposed would answer the purpose of having a general representation and protection of ourselves toward the world at large, and yet would limit the local power and authority, consistently with good and free Government, as respected populations homogeneous and acquainted with each other, and with their own wants and the methods of supplying them.

The Articles of Confederation, framed during the Revolution, ratified at different times during its progress and at its close, was a Government under which we subsisted—for how long? Until 1787—but four years from the time that we had an independent nationality—we were satisfied with the imperfect Union that our provisional Government had originated, and that we had shaped into somewhat more consistency under the Articles of Confederation. Why did we not stay under that? We were a feeble community. We had but little population, but little wealth. We had but few occasions of discontent that belong to great, and wealthy, and populous States. But the fault, the difficulty, was, that there were in the Confederation too many features which our learned friends, their clients here, and theoretical teachers of theirs elsewhere, contend, make the distinctive character of the American Constitution, as finally developed and established. The difficulty was that, although we were apparently and intentionally a nation, as respected the rest of the world, and for all the purposes of common interest and common protection and common development, yet this element of separate independency, and these views that the Government thus framed operated, not as a Government over

individuals, but as a Government over local communities in an organized form, made its working imperfect, impossible, and the necessary occasion of dissension, and weakness, and hostility, and left it without the least power, except by continued force and war, to maintain nationality.

Now, it was not because we were sovereigns, all of us, because we had departed from sovereignty. There was not the least right in any State to send an ambassador, or make a treaty, or have anything signed; but the vice was, that the General Government had no power or authority, directly, on the citizens of the States, but had to send its mandates for contributions to the common treasury, and its requirements for quotas for the common army and the common navy, directly to the States. Now, I tarry no longer on this than to say, that the brief experience of four years showed that it was an impossible proposition for a Government, that there should be in it even these imperfect, clipped and crippled independencies, that were made out of the original provinces and called States. In 1787, the great Convention had its origin, and in 1789 the adoption of the Constitution made something that was supposed to be, and entitled to be, and our citizens required to be, as completely different, on this question of double sovereignty, and divided allegiance, and equal right of the nation to require and of a State to refuse, as was possible. If, indeed, instead of the Confederation having changed itself from an imperfect connection of States limited and reduced in sovereignty, into a Government where the nation is the coequal and co-ordinate power (as our friends express it) of every State in it, why surely our brief experience of weakness and disorder, and of contempt, such as was visited upon us by the various nations with whom we had made treaties, that we could not fulfil them, found, in the practical wisdom of the intelligent American people, but a very imperfect and unsatisfactory solution, if the theories of the learned counsel are correct, that these

United States are, on the one part, a power, and on the other part, thirty-four different powers, all sovereign, and the two having complete rights of sovereignty, and dividing the allegiance of our citizens in every part of our territory.

Now, the language of the Constitution is familiar to all of you. That it embodies the principle of a General Government acting upon all the States, and upon you, and upon me, and upon every one in the United States; that it has its own established Courts—its own mandate by which jurors are brought together—its own laws upon all the subjects that are attributed to its authority; that there is an establishment known as the Supreme Court, which, with the appropriate inferior establishments, controls and finally disposes of every question of law, and right, and political power, and political duty; and that this adjusted system of one nation with distributed local power, is, in its working, adequate to all the varied occasions which human life develops—we all know. We have lived under it, we have prospered under it, we have been made a great nation, a united people, free, happy, and powerful.

Now, gentlemen, it is said—and several points in our history have been appealed to, as well as the disturbances that have torn our country for the last year—that this complete and independent sovereignty of the States has been recognized. Now, there have been several occasions on which this subject has come up. The first was under the administration of the first successor of General Washington—John Adams—when the famous Virginia and Kentucky resolutions had their origin. About these one of my learned friends gave you a very extensive discussion, and another frankly admitted that he could not understand the doctrine of co-ordinate, equal sovereignty of two powers within the same State. On the subject of these Virginia resolutions, and on the question of whether they were the recognized doctrines of this Government, I ask your attention to but

one consideration of the most conclusive character, and to be disposed of in the briefest possible space.

The proposition of the Virginia resolutions was, that the States who are parties to the compact have the right and are in duty bound to interpose to arrest the progress of the evil (that is, when unconstitutional laws are passed), and to maintain, within their respective limits, the authority, rights, and liberties pertaining to them. That is to say, that where any law is passed by the Congress of the United States, which the State of Virginia, in its wise and independent judgment, pronounces to be in excess of the Constitutional power, it is its right and duty to interpose. How? By secession? No. By rebellion? No. But by protecting and maintaining, within its territory, the authority, rights, and liberties pertaining to it. Now, these resolutions grew out of what? Certain laws, one called the "Alien" and the other the "Sedition" law, rendered necessary by the disturbances communicated by the French revolution to this country, and which necessarily came within the doctrine of my friend, Mr. Larocque, that there is not the least right of secession when the laws are capable of being the subject of judicial investigation. Well, those laws were capable of being the subject of judicial investigation, and the resolutions did not claim the right of secession, but of nullification. My learned friend says that the doctrine of "secession" has no ground.

But what was the fate of the "Virginia resolutions"? For Virginia did not pretend that she had all the wisdom, and virtue, and patriotism of the country within her borders. She sent these resolutions to every State in the Union, and desired the opinion of their legislatures and their governors on the subject. Kentucky passed similar resolutions; and Kentucky, you will notice, had just been made a State, in 1793—an off-shoot from Virginia; and, as the gentleman has told you, Mr. Madison wrote the resolutions of Virginia, and

Mr. Jefferson those of Kentucky. So that there was not any great independent support, in either State, for the views, thus identical, and thus promulgated by these two Virginians. Their great patriotism, and wisdom, and intelligence, are a part of the inheritance we are all proud of. But, when the appeal was sent for concurrence to New York, South Carolina, Georgia, Massachusetts, and the New England States, what was the result? Why, Kentucky, in 1799, regrets that, of all the States, none, except Virginia, acquiesced in the doctrines; and the answers of every one of the States that made response are contained in the record which also contains the Virginia and Kentucky resolutions. And that doctrine there exploded, and exploded forever, until its recurrence in the shape of nullification, in South Carolina, as part of the doctrines of this Constitution.

We had another pressure on the subject of local dissatisfaction, in 1812; and then the seat of discontent and heresy was New England. I do not contend, and never did contend, in any views I have taken of the history of affairs in this country, that the people of any portion of it have a right to set themselves in judgment as superiors over the people of any other portion. I never have had any doubt that, just as circumstances press on the interests of one community or another, just so are they likely to carry their theoretical opinions on the questions of the power of their Government and of their own rights, and just so to express themselves. So long as they confine themselves to resolutions and politics, to the hustings, and to the elections, nobody cares very much what their political theories are. But my learned friend Mr. Brady has taken the greatest satisfaction in showing, that this notion of the co-ordinate authority of the States with the nation, found its expression and adoption, during the war of 1812, in some of the States of New England. Well, gentlemen, I believe that all sober and sensible people agree that, whether or not the New Eng-

land States carried their heresies to the extent of justifying the nullification of a law, or the revocation of their assent to the Confederacy, and their withdrawal from the common Government, the doctrines there maintained were not suitable for the strength and the harmony, for the unity and the permanency, of the American Government. I believe that the condemnation of those principles that followed, from South Carolina, from Virginia, from New York, and from other parts of the country, and the resistance which a large, and important, and intelligent, and influential portion of their own local community manifested, exterminated those heresies forever from the New England mind.

Next, we come to 1832, and then, under the special instruction and authority of a great Southern statesman (Mr. Calhoun) whose acuteness and power of reasoning have certainly been scarcely, if at all, surpassed by any of our great men, the State of South Carolina undertook, not to secede, but to nullify; and yet Mr. Larocque says, that this pet doctrine of Mr. Calhoun,—nullification, and nothing else,—is the absurdest thing ever presented in this country; and we are fortunate, I suppose, in not having wrecked our Union upon that doctrine.

Now we come, next, to the doctrine of secession. Nullification, rejected in 1798 by all the States, except Virginia and Kentucky, and never revived by them,—nullification, rejected by the sober sense of the American People,—nullification was put down by the strong will of Jackson, in 1832,—having no place to disturb the strength and hopes and future of this country. And what do we find is the proposition now put forward, as matter of law, to your Honors, to relieve armed and open war from the penalties of treason, and from the condemnation of a lesser crime? What is it, as unfolded here by the learned advocate (Mr. Larocque), with all his acuteness, but so manifest an absurdity that its recognition by a lawyer, or an intelligent Jury seems almost impos-



sible? It is this: This Union has its power, its authority, its laws. It acts directly upon the individuals inside of every State, and they owe it allegiance as their Government. It is a Government which is limited, in the exercise of its power, to certain general and common objects, not interfering with the domestic affairs of any community. Within that same State there is a State Government, framed into this General Government, to be certainly a part of it in its territories, a part of it in its population, a part of it in every organization, and every department of its Government: The whole body of its administration of law, the Legislature and the Executive, are bound, by a particular oath, to sustain the Constitution of the United States. But, although it is true that the State Government has authority only where the United States Government has not, and that the United States have authority only where the State has not; and although there is a written Constitution, which says what the line of separation is; and although there is a Supreme Court, which, when they come into collision, has authority to determine between them, and no case whatever, affecting the right or the conduct of any individual man, can be subtracted from its decision; yet, when there comes a difference between the State and the General Government, the State has the moral right, and political right, to insist upon its view, and to maintain it by force of arms, and the General Government has the right to insist upon its view, and to maintain it by force of arms. And then we have this poor predicament for every citizen of that unlucky State,—that he is bound by allegiance, and under the penalty of treason, to follow each and both of these powers. And as, should he follow the State, the United States, if it be treason, would hang him, and, if he should follow the United States, the State, if it be treason, would hang him, this peculiar and whimsical result is produced,—that when the United States undertake to hang him for treason his answer is—"Why, if I

had not done as I did, the State would have hanged me for treason, and, surely I cannot be compelled to be hanged one way or the other—so, I must be protected from hanging, as to both!” Well, *that*, I admit, is a sensible way to get out of the difficulty, for the man and for the argument, if you can do it. But it is a peculiar result, to start with two sovereigns, each of which has a right over the citizen, and to end with the citizen’s right to choose which he shall serve, and to throw it in the face of offended majesty and justice—“Why, your statute of treason is repealed as against me, because the State, of which I am a subject, has counseled a particular course of conduct!”

Now, gentlemen, my learned friend qualifies even this theory—which probably must fall within the condemnation of the perhaps somewhat harsh and rough suggestion of Mr. Justice Grier, of a “political platitude”—by the suggestion that it only applies to questions where the United States cannot settle the controversy. And when my learned friend is looking around for an instance or an occasion that is likely to arise in human affairs, and in this nation, and in this time of ours, he is obliged to resort to the most extraordinary and extravagant proposition by way of illustration, and one that has, in itself, so many of the ingredients of remoteness and impossibility, that you can hardly think a Government deficient in not having provided for it. He says, first—suppose we have a President, who is a Massachusetts man. Well, that is not very likely in the course of politics at present. And then, suppose that he is a bad man,—which, probably, my learned friends would think not as unlikely as I should wish it to be. And, then, suppose he should undertake to build up Boston, in its commerce, at the expense of New York; and should put a blockading squadron outside of New York, by mere force of caprice and tyranny, without any law, and without any provision for the payment of the men of the Navy, or any commission

or authority to any of them under which they could find they were protected for what they should do, in actually and effectually blockading our port. My learned friend acknowledges that this is a pretty violent sort of suggestion, and that no man in his senses would pretend to do such a thing, however bad he was, unless he could find a reasonable sort of pretext for it. Therefore he would, wisely and craftily, pretend that he had private advices that England was going to bombard New York. Now that is the practical case created by my learned friend's ingenuity and reflection, as a contingency in which this contest by war between New York and the United States of America would be the only practical and sensible mode of protecting our commerce, and keeping you and me in the enjoyment of our rights as citizens of the State of New York. Well, to begin with, if we had a fleet off New York harbor, what is there that would require vessels to go to Boston instead of to Philadelphia, Baltimore, and other places that are open? In the second place, how long could we be at war, and how great an army could we raise in New York, to put in the field against the Federal Government, before this pretence of private advices that England was going to bombard New York, would pass away, and the naked deformity of this bad Massachusetts President be exposed? Why, gentlemen, it is too true to need suggestion, that the wisdom which made this a Government over all individual citizens, and made every case of right and interest that touches the pocket and person of any man in it a question of judicial settlement, made it a Government which requires for the solution of none of the controversies within it, a resort to the last appeal—to battle, and the right of kings.

## SECOND DAY'S ARGUMENT.

Gentlemen of the Jury: In resuming the course of my remarks, already necessarily drawn to a very considerable length, I must recall to your attention the point that I had

reached when the Court adjourned. I was speaking of this right of secession, as inconsistent with the frame, the purpose, and the occasion upon which the General Government was formed; and of the illustration invented by my learned friend, and so improbable in its circumstances, of the position of the United States and one of the States of the Union, that could bring into play and justify this resort to armed opposition. I had said what I had to say, for the most part, as to the absurdity and improbability of the case supposed, and the inadequacy, the worthlessness, the chimerical nature of the remedy proposed. Now, you will observe that, in the case supposed, the blockade of New York was to be without law, without authority, upon the mere capricious pretence of the President—a pretence so absurd that it could not stand the inspection of the people for a moment. What is the use of a pretence unless it is a cover for the act which it is intended to cloak? In such a case, the only proper, peaceful course would be to raise the question, which might be raised judicially, by attempting, in a peaceful manner, to pass the blockade, and throw the consequences upon the subordinate officers who attempted to execute the mere usurpation of the President, and, following the declaration of the Divine writings, that “wisdom is better than weapons of war,” wait until the question could be disposed of under the Constitution of the United States. For you will observe that, in the case supposed, there is no threat to the integrity, no threat to the authority, no threat to the existence of the State Government, or its Constitution; but an impeding of the trade or interests of the people of this city, and of the residents of all parts of the country interested in the commerce of New York. That port is not the port of New York alone. It is the port of the United States of America, and all the communities in the Western country, who derive their supplies of foreign commodities through our internal navigation, when commerce has introduced

them into this port, are just as much affected—just as much injured and oppressed—by this blockade of our great port and emporium, as are the people of the State of New York. So that, so far from its being a collision between the Government of the State of New York and the Government of the United States, it is a violent oppression, by usurpation—exposing to the highest penalties of the law the magistrate who has attempted it—exercised upon the people of the United States wherever residing, in the far West, in the surrounding States, in the whole country, who are interested in the maintenance of the commerce of this port. I need not say that the action of our institutions provides a ready solution for this difficulty. Two or three weeks must bring to the notice of every one the frivolity of the pretence of the Executive, that there was a threat of armed attack by a foreign nation. But if two or three weeks should bring the evidence that this was not an idle fear, and that, by information conveyed to the Government, this threat was substantial, and was followed by its attempted execution,—why, then, how absurd the proposition that, under the opinion of the State of New York that this was but an idle pretext, for purposes of oppression, the State should fly into arms against the power exercised to protect the city from foreign attack! The working of our affairs, which brings around the session of Congress at a time fixed by law—not at all determinable by the will of the President—exposes him to the grand inquest of the people, which sits upon his crime, and, by his presentation and trial before the great Court of Impeachment, in the course of one week—nay, in scarcely more than one day after its coming into session—both stamps this act as an usurpation, and dispossesses the magistrate who has violated the Constitution. And yet, rather than wait for this assertion of the power of the Constitution peacefully to depose the usurping magistrate, my friend must resort to this violent intervention of armed

collision, that would keep us—in theory, at least—constantly maintaining our rights by the mere method of force, and would make of this Government—at the same time that they eulogize the founders of it, as the best and wisest of men—but an organization of armed hostilities, and its framers only the architects of an ever-impending ruin!

My learned friend, Mr. Brady, has asked my attention to the solution of a case wherein he thinks the State Government might be called upon to protect the rights of its citizens against the operation of an Act of Congress, by proposing this question: Suppose Congress should require that all the expenses of this great war, as we call it, should be paid by the State of New York,—what should we do in that case? Nothing but hostilities are a solution for that case, it is suggested. Now, I would freely say to my learned friend, Mr. Brady, that if the General Government, by its law, should impose the whole taxation of the war upon the State of New York, I should advise the State of New York, or any citizen in it, not to pay the taxes. That is the end of the matter. And I would like to know if there is any warlike process by which the General Government of the United States exacts its tribute of taxation, that could impose the whole amount on New York? As the process of taxation goes on, it is distributed through different channels, and presents itself as an actual and effective process, from the tax-gatherer to the tax-payer: "Give me so many dollars." And the tax-payer says: "There is no law for it, and I will not do it." Then the process of collection raises for consideration this inquiry—whether the tax is according to the law, and according to the constitutional law of the United States of America. And this tribunal, formed to decide such questions—formed to settle principles in single cases, that shall protect against hostilities these great communities—disposes of the question. If the law is constitutional, then the tax is to be paid—if unconstitutional, then the tax is not collectable; and the question is settled. But my learned

friends, in their suggestions of what is a possible state of law that may arise in this country, forget the great distinction between our situation under the Federal Government and our situation as Colonies under the authority of the King and Parliament of England. It is the distinction between not being represented and being represented.

Why, my learned friends, in order to get the basis of a possible suggestion of contrariety of duty and of interest between the Government of the United States and the people in these States, must overlook, and do overlook, the fact that there is not a functionary in the Federal Government, from the President down to the Houses of Congress, that does not derive his authority from the people, not of one State, not of any number of States, but of all the States. And thus standing, they are guardians and custodians, in their own interests—in their own knowledge of the interests of their own people—in their own knowledge that their place in the protection, power, and authority of the Government of the United States, proceeds by the favor and the approval of the local community in which they reside. So far, therefore, from anything in the arrangement or the working of these political systems being such as to make the Representatives or Senators that compose Congress the masters or the enemies of the local population of the States from which they respectively come, they come there under the authority of the local population which they represent, dependent upon it for their place and continuance, and not on the Federal Government.

Away, then, with the notion, so foreign to our actual, constituted Government, that this Government of the United States of America is a Government that is extended over these States, with an origin, a power, a support independent of them, and that it contains in itself an arrangement, a principle, a composition that can by possibility excite or sustain these hostilities! Why, every act of Congress must

govern the whole Union. Every tax must, to be constitutional, be extended over the whole Union, and according to a fixed ratio of distribution between the States, established by the Constitution itself. Now, therefore, when any particular interest, any particular occasion, any supposed necessity, any political motive, suggests a departure, on the part of the General Government, from a necessary adherence to this principle of the Constitution, you will perceive that not only are the Representatives and Senators who come from the State against which this exercise of power is attempted, interested to oppose, in their places in Congress, the violation of the Constitution, but the Representatives and the Senators from every other State, in support of the rights of the local communities in which they reside, have the same interest and the same duty, and may be practically relied upon to exercise the same right, and authority, and opposition, in protection of their communities, against an application of the same principle, or an obedience to the same usurpation, on subsequent occasions, in reference to other questions that may arise. Therefore, my learned friends, when they are talking to you, theoretically or practically, about the opposition that may arise between co-ordinate and independent sovereignties, and would make the glorious Constitution of this Federal Government an instance of misshapen, and disjointed, and impractical inconsistencies, forget that the great basis of both of them rests in the people, and in the same people—equally interested, equally powerful, to restrain and to continue the movements of each, within the separate, constitutional rights of each. Now, unquestionably, in vast communities, with great interests, diverse and various, opinions may vary, and honest sentiments may produce the enactment of laws of Congress, which equally honest sentiments, on the part of local communities, expressed through the action of State legislation, may regard as inconsistent with the Government and the Constitution



of the United States, and with the rights of the States. But, for these purposes, for these occasions, an ample and complete theoretical and practical protection of the rights of all is found, in this absolute identity of the interests of the people and of their authority in both the form and the structure of their complex Government, and in the means provided by the Constitution itself for testing every question that touches the right, the interest, the liberty, the property, the freedom of any citizen, in all and any of these communities, before the Supreme Court of the United States. Let us not be drawn into any of these shadowy propositions, that the whole people may be oppressed, and not a single individual in it be deprived of any personal right. Whenever the liberty of the citizen is abridged in respect to any personal right, the counsel concede that the Courts are open to him; and that is the theory, the wisdom, and the practical success of the American Constitution.

Now, gentlemen of the Jury, but one word more on this speculative right of secession. It is founded, if at all, upon the theory, that the States, having been, anterior to the formation of the Constitution, independent sovereignties, are, themselves, the creators, and that the Constitution is the creature proceeding from their power. I have said all I have to say about either the fact, or the result of the fact, if it be one, of the existence of these antecedent, complete national sovereignties on the part of any of the original States.

But, will my learned friends tell me how this theory of theirs, in respect to the original thirteen States, has any application to the States, now quite outnumbering the original thirteen, which have, since the Constitution was formed, entered into the Government of this our territory, this our people? Out of thirty-four States, eleven have derived their existence, their permission to exist, their territory, their power to make a Constitution, from the General

Government itself, out of whose territory—either acquired originally by the wealth or conquest of the Federal Government, or derived directly or indirectly through cession or partition or separation of the original Colonies—they have sprung into existence. Of these eleven allied and confederate States, but four came from the stock of the original thirteen, and seven derived their whole power and authority from the permission of the Constitution of the United States, and have sprung into existence, with the breath of their lives breathed into them through the Federal Government. When the State of Louisiana talks of its right to secede by reason of its sovereignty, by reason of its being one of the creators of the Federal Government, and of the Federal Constitution—one of the actors in the principles of the American Revolution, and in the conquest of our liberties from the English power—we may well lift our hands in surprise at the arrogance of such a suggestion. Why, what was Louisiana, in all her territory, at the time of the great transaction of the Federal Revolution, and for a long time afterwards, but a province of Spain, first, and afterwards of France? How did her territory—the land upon which her population and her property rest—come to be a part of our territory, and to give support to a State government, and to State interests? Why, by its acquisition, under the wise policy of Mr. Jefferson, early in this century, upon the opportunity offered, by the necessity or policy of the Emperor Napoleon, for its purchase, by money, as you would buy a ship, or a strip of land to build a fort on.

Coming thus to the United States, by its purchase, how did Louisiana come to be set apart, carved out of the immense territory comprehended under the name of Louisiana, but by lines of division and concession of power, proceeding from the Government of the United States? And why did we purchase it? We purchased it preliminarily, not so much to seize the opportunity for excluding from a foothold

on this Continent a great foreign Power, which, although its territory here was waste and uninhabited, had the legal right to fill it, and might in the course of time, fill it with a population hostile in interests to our own,—not so much for this remote contingency, as to meet the actual pressing necessity, on the part of the population that was beginning to fill up the left or eastern bank of the Mississippi, from its source to near its mouth, that they should have the mouth of the Mississippi also within their territory, governed by the same laws and under the same Government. And now, forsooth, the money and the policy of the United States having acquired this territory, and conceded the political rights contained in the Constitution of Louisiana, we are to justify the secession of the territory of Louisiana, carrying the mouth of the Mississippi with her, on the theory that she was one of the original sovereignties, and one of the creators of the Constitution of the United States!

Well, gentlemen, how are our learned friends to escape from this dilemma? Are they to say that our constituted Government, complex, composed of State and of Federal power, has two sets of State and Federal relations within it, to wit, that which existed between the General Government and the thirteen sovereign, original States, and that which exists between the Federal Government and the other twenty-one States of the Union? Is it to follow, from this severance, that these original Colonies, declaring their independence—South Carolina, North Carolina, Virginia and Georgia—are to draw back to themselves the portions of their original territory that have since, under the authority of the Constitution, been formed into separate communities? Our Constitution was made by and between the States, and the people of the States—not for themselves alone—not limited to existing territory, and arranged State and Provincial Governments—but made as a Government, and made with principles in respect to Government that should

admit of its extension by purchase, by conquest, by all the means that could bring accretion to a people in territory and in strength, and that should be, in its principles, a form of Government applicable to and sufficient for the old and the new States, and the old and the new population. I need not refer to the later instances, where, by purchase, we acquired Florida, also one of the seceded States, and where, by our armies, we gained the western coast of the Pacific. Are these the relations into which the power, and blood, and treasure of this Government bring it, in respect to the new communities and the new States which, under its protection, and from its conceded power, have derived their very existence?

Why, gentlemen, our Government is said, by those who complain of it, or who expose what they regard as its difficulties, to have one element of weakness in it, to wit, the possibility of discord between the State and Federal authorities. But, if you adopt the principle, that there is one set of rules, one set of rights, between the Federal Government and the original States that formed the Union, and another set of rules between the Federal Government and the new States, I would like to know what becomes of the provision of the Constitution, that the new States may be admitted on the same footing with the old? What becomes of the harmony and accord among the local Governments of this great nation, which we call State Governments, if there be this superiority, in every political sense, on the part of the old States, and this absolute inferiority and subjection on the part of the new?

And now, gentlemen, having done with this doctrine of secession, as utterly inconsistent with the theory of our Government, and utterly unimportant, as a practical right, for any supposable or even imaginable case that may be suggested, I come to consider the question of the right of revolution. I have shown you upon what principles, and

upon what substantial question, between being subjects as slaves, or being participants in the British Government, our Colonies attempted and achieved their independence. As I have said to you, a very brief experience showed that they needed, to meet the exigencies of their situation, the establishment of a Government that should be in accordance with the wishes and spirit of the people, in regard of freedom, and yet should be of such strength, and such unity, as would admit of prosperity being enjoyed under it, and of its name and power being established among the nations of the earth. Now, without going into the theories of Government, and of the rights of the people, and of the rights of the rulers, to any great extent, we all know that there has been every variety of experiment tried, in the course of human affairs, between the great extreme alluded to by my learned friend (Mr. Brady) of the slavery of Egyptians to their king—the extreme instance of an entire population scarcely lifted above the brutes in their absolute subjection to the tyranny of a ruler, so that the life, and the soul, and the sweat, and the blood of a whole generation of men are consumed in the task of building a mausoleum as the grave of a king—and the later efforts of our race, culminating in the happy success of our own form of Government, to establish, on foundations where liberty and law find equal support, the principle of Government, that Government is by, and for, and from all the people—that the rulers, instead of being their masters and their owners, are their agents and their servants—and that the greatest good of the greatest number is the plain, practical and equal rule which, by gift from our Creator, we enjoy.

Now this, you will observe, is a question which readily receives our acceptance. But the great problem in reference to the freedom of a people, in the establishment of their Government, presents itself in this wise: The people, in order to maintain their freedom, must be masters of their

Government, so that the Government may not be too strong, in its arrangement of power, to overmaster the people; but yet, the Government must be strong enough to maintain and protect the independence of the nation against the aggressions, the usurpations, and the oppressions of foreign nations. Here you have a difficulty raised at once. You expose either the freedom of the nation, by making the Government too strong for the preservation of individual independence, or you expose its existence, by making it too weak to maintain itself against the passions, interests and power of neighboring nations. If you have a large nation—counting its population by many millions, and the circumference of its territory by thousands of miles—how can you arrange the strength of Government, so that it shall not, in the interests of human passions, grow too strong for the liberties of the people? And if, abandoning in despair that effort and that hope, you circumscribe the limits of your territory, and reduce your population within a narrow range, how can you have a Government and a nation strong enough to maintain itself in the contests of the great family of nations, impelled and urged by interests and passions?

Here is the first peril, which has never been successfully met and disposed of in any of the forms of Government that have been known in the history of mankind, until, at least, our solution of it was attempted, and unless it has succeeded and can maintain itself. But, again, this business of self-government by a people has but one practical and sensible spirit and object. The object of free Government is, that the people, as individuals, may, with security, pursue their own happiness. We do not tolerate the theory that all the people constituting the nation are absorbed into the national growth and life. The reason why we want a free Government is, that we may be happy under it, and pursue our own activities according to our nature and our faculties. But, you will see, at once, that it is of the essence of being

able to pursue our own interests under the Government under which we live, that we can do so according to our own notions of what they are, or the notions of those who are intelligently informed of, participate in, and sympathize with, those interests. Therefore, it seems necessary that all of the every-day rights of property, of social arrangements, of marriage, of contracts—everything that makes up the life of a social community—shall be under the control, not of a remote or distant authority, but of one that is limited to, and derives its ideas and principles from, a local community.

Now, how can this be in a large nation—in a nation of thirty millions, distributed over a zone of the earth? How are we to get along in New York, and how are others to get along in South Carolina, and others in New England, in the every-day arrangements that proceed from Government, and affect the prosperity, the freedom, the independence, the satisfaction of the community with the condition in which it lives? How can we get along, if all these minute and every-day arrangements are to proceed from a Government which has to deal with the diverse opinions, the diverse sentiments, the diverse interests, of so extensive a nation? But if, fleeing from this peril, you say that you may reduce your nation, you fall into another difficulty. The advanced civilization of the present day requires, for our commercial activity, for our enjoyment of the comforts and luxuries of life, that the whole globe shall be ransacked, and that the power of the nation which we recognize as our superior shall be able to protect our citizens in their enterprises, in their activities, in their objects, all over the world. How can a little nation, made up of Massachusetts, or made up of South Carolina, have a flag and a power which can protect its commerce in the East Indies and in the Southern Ocean? Again—we find that nations, unless they are separated by wide barriers, necessarily, in the course of

human affairs, come into collision; and, as I have shown to you, the only arbitrament for their settlement is war. But war is a scourge—an unmitigated scourge—so long as it lasts, and in itself considered. But for objects which make it meritorious and useful, it is a scourge never to be tolerated. It puts in abeyance all individual rights, interests, and schemes, until the great controversy is settled.

If, then, we are a small nation, surrounded on all sides by other nations, with no natural barriers, with competing interests, with occasions of strife and collision on all sides, how can we escape war, as a necessary result of that miserable situation? But war strengthens the power of Government, weakens the power of the individual, and establishes maxims and creates forces, that go to increase the weight and the power of Government, and to weaken the rights of the people. Then, we see that, to escape war, we must either establish a great nation, which occupies an extent of territory, and has a fund of power sufficient to protect itself against border strifes, and against the ambition, the envy, the hatred of neighbors; or else one which, being small, is exposed to war from abroad to subjugate it, or to the greater peril to its own liberties, of war made by its own Government, thus establishing principles and introducing interests which are inconsistent with liberty.

I have thus ventured, gentlemen, to lay before you some of these general principles, because, in the course of the arguments of my learned friends, as well as in many of the discussions before the public mind, it seems to be considered that the ties, the affections and the interests, which oblige us to the maintenance of this Government of ours, find their support and proper strength and nourishment only in the sentiments of patriotism and duty, because it happens to be our own Government; and that, when the considerations of force or of feeling which bring a people to submit to a surrender of their Government, or to a successful conquest of a part of



their territory, or to a wresting of a part of their people from the control of the Government, shall be brought to bear upon us, we shall be, in our loss and our surrender, only suffering what other nations have been called upon to lose and to surrender and that it will be but a change in the actual condition of the country and its territory. But you will perceive that, by the superior fortune which attended our introduction into the family of nations, and by the great wisdom, forecast, and courage of our ancestors, we avoided, at the outset, all the difficulties between a large territory and a numerous population on the one hand, and a small territory and a reduced population on the other hand, and all those opposing dangers of the Government being either too weak to protect the nation, or too strong, and thus oppressive of the people, by a distribution of powers and authorities, novel in the affairs of men, dependent on experiment, and to receive its final fate as the result of that experiment. We went on this view—that these feeble Colonies had not, each in itself, the life and strength of a nation; and, yet, these feeble Colonies, and their poor and sparse population, were nourished on a love of liberty and self-government. These sentiments had carried them through a successful war against one of the great powers of the earth. They were not to surrender that for which they had been fighting to any scheme, to any theory of a great, consolidated nation, the Government of which should subdue the people and re-introduce the old fashion in human affairs—that the people were made for the rulers, and not the rulers by and for the people. They undertook to meet, they did meet, this difficult dilemma in the constitution of Government, by separating the great fund of power, and reposing it in two distinct organizations. They reserved to the local communities the control of their domestic affairs, and attributed the maintenance and preservation of them to the State Governments. They undertook to collect and deposit, under the form of a written Con-

stitution, with the general Government, all those larger and common interests which enter into the conception and practical establishment of a distinct nation among the nations of the earth, and determined that they would have a central power which should be adequate, by drawing its resources from the patriotism, from the duty, from the wealth, from the numbers, of a great nation, to represent them in peace and in war,—a nation that could protect the interests, encourage the activities, and maintain the development of its people, in spite of the opposing interests or the envious or hostile attacks of any nation. They determined that this great Government, thus furnished with this range of authority and this extent of power, should not have anything to do with the every-day institutions, operations and social arrangements of the community into which the vast population and territory of the nation were distributed. They determined that the people of Massachusetts, the people of New York, and the people of South Carolina, each of them, should have their own laws about agriculture, about internal trade, about marriage, about apprenticeship, about slavery, about religion, about schools, about all the every-day pulsations of individual life and happiness, controlled by communities that moved with the same pulsations, obeyed the same instincts, and were animated by the same purposes. And, as this latter class of authority contains in itself the principal means of oppression by a Government, and is the principal point where oppression is to be feared by a people, they had thus robbed the new system of all the dangers which attend the too extensive powers of a Government. They divided the fund of power, to prevent a great concentration and a great consolidation of the army of magistrates and officers of the law and of the Government which would have been combined by a united and consolidated authority, having jurisdiction of all the purposes of Government, of all the interests of citizens, and of the entire

population and entire territory in these respects. They thus made a Government, complex in its arrangements, which met those opposing difficulties, inherent in human affairs, that make the distinction between free Governments and oppressive Governments. They preserved the people in their enjoyment and control of all the local matters entering into their every-day life, and yet gave them an establishment, springing from the same interests and controlled by the same people, which has sustained and protected us in our relations to the family of nations on the high seas and in the remote corners of the world.

Now, this is the scheme, and this is the purpose, with which this Government was formed; and you will observe that there is contained in it this separation, and this distribution. And our learned friends, who have argued before you respecting this theory, and this arrangement and practice of the power of a Government, as inconsistent with the interests and the freedom of the people, have substantially said to you that it was a whimsical contrivance, that it was an impossible arrangement of inconsistent principles, and that we must go back to a simple Government composed of one of the States, or of a similar arrangement of territory and people, which would make each of us a weak and contemptible power in the family of nations—or we must go back to the old consolidation of power, such as is represented by the frame of France or England in its Government, or, more distinctly, more absolutely, and more likely to be the case, for so vast a territory and so extensive a population as ours, to the simple notion of Russian Autocracy.

That, then, being the object, and that the character, of our institutions, and this right of secession not being provided for, or imagined, or tolerated in the scheme, let us look at the right of revolution, as justifying an attempt to overthrow the Government; and let us look at the occasions of revolution, which are pretended here, as giving a support,

before the world, in the forum of conscience, and in the judgment of mankind, for the exercise of that right.

And first, let me ask you whether, in all the citations from the great men of the Revolution, and in the later stages of our history, any opinion has been cited which has condemned this scheme as unsuitable and insufficient for the freedom and happiness of the people, if it can be successful? I think not. The whole history of the country is full of records of the approval, of the support, of the admiration, of the reverent language which our people at large, and the great leaders of public opinion—the great statesmen of the country—have spoken of this system of Government. Let me ask your attention to but two encomiums upon it, as represented by that central idea of a great nation, and yet a divided and local administration of popular interests—to wit, one in the first stage of its adoption, before its ratification by the people was complete; and the other, a speech made at the very eve of, if not in the very smoke of, this hostile dissolution of it.

Mr. Pinckney, of South Carolina, who had been one of the delegates from that State in the National Convention, and had co-operated with the Northern statesmen, and with the great men of Virginia, in forming the Government as it was, in urging on the Convention of South Carolina the adoption of the Constitution, and its ratification, said:

“To the Union we will look up as the temple of our freedom,—a temple founded in the affections and supported by the virtue of the people. Here we will pour out our gratitude to the Author of all good, for suffering us to participate in the rights of a people who govern themselves. Is there, at this moment, a nation on the earth which enjoys this right, where the true principles of representation are understood and practised, and where all authority flows from, and returns at stated periods to, the people? I answer, there is not. Can a Government be said to be free

where those do not exist? It cannot. On what depends the enjoyment of those rare, inestimable rights? On the firmness and on the power of the Union to protect and defend them."

Had we anything from that great patriot and statesman of this right of secession, or independence of a State, as an important or a useful element in securing these rare, these unheard of, these inestimable privileges of Government, which the Author of all good had suffered the people of South Carolina to participate in? No—they depended "on the firmness and on the power of the Union to protect and defend them." Mr. Pinckney goes on to say: "To the philosophic mind, how new and awful an instance do the United States at present exhibit to the people of the world! They exhibit, sir, the first instance of a people who, being thus dissatisfied with their Government, unattacked by a foreign force and undisturbed by domestic uneasiness, coolly and deliberately resort to the virtue and good sense of the country for a correction of their public errors."

That is, for the abandonment of the weakness and the danger of the imperfect Confederation, and the adoption of the constitutional and formal establishment of Federal power. Mr. Pinckney goes on to say:

"It must be obvious that, without a superintending Government, it is impossible the liberties of this country can long be secure. Single and unconnected, how weak and contemptible are the largest of our States! how unable to protect themselves from external or domestic insult! how incompetent, to national purposes, would even the present Union be! how liable to intestine war and confusion! how little able to secure the blessings of peace! Let us, therefore, be careful in strengthening the Union. Let us remember we are bounded by vigilant and attentive neighbors"—(and now Europe is within ten days, and they are near neighbors)—"who view with a jealous eye our rights to empire."

Pursuing my design of limiting my citations of the opinions of public men to those who have received honor from, and conferred honor on, that portion of our country and those of our countrymen now engaged in this strife with the General Government, let me ask your attention to a speech delivered by Mr. Stephens, now the Vice-President of the so-called Confederate States, on the very eve of, and protesting against, this effort to dissolve the Union. I read from page 220 and subsequent pages of the documents that have been the subject of reference heretofore:

"The first question that presents itself"—(says Mr. Stephens to the assembled Legislature of Georgia, of which he was not a member, but which, as an eminent and leading public man, he had been invited to address)—"is, shall the people of the South secede from the Union in consequence of the election of Mr. Lincoln to the Presidency of the United States? My countrymen, *I tell you frankly, candidly, and earnestly, that I do not think that they ought.* In my judgment, the election of no man, constitutionally elected to that high office, is sufficient cause for any State to separate from the Union. It ought to stand by and aid still in maintaining the Constitution of the country. To make a point of resistance to the Government—to withdraw from it because a man has been constitutionally elected—puts us in the wrong. We are pledged to maintain the Constitution. Many of us have sworn to support it.

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"But it is said Mr. Lincoln's policy and principles are against the Constitution, and that if he carries them out it will be destructive of our rights. Let us not anticipate a threatened evil. If he violates the Constitution, then will come our time to act. Do not let us break it because, forsooth, he may. If he does, that is the time for us to strike. . . . My countrymen, I am not of those who believe this Union has been a curse up to this time. True

men—men of integrity—entertain different views from me on this subject. I do not question their right to do so; I would not impugn their motives in so doing. Nor will I undertake to say that this Government of our fathers is perfect. There is nothing perfect in this world, of a human origin,—nothing connected with human nature, from man himself to any of his works. You may select the wisest and best men for your Judges, and yet how many defects are there in the administration of justice? You may select the wisest and best men for your legislators, and yet how many defects are apparent in your laws? And it is so in our Government.

“But that this Government of our fathers, with all its defects, comes nearer the objects of all good Governments than any on the face of the earth, is my settled conviction. Contrast it now with any on the face of the earth.” (“England,” said Mr. Toombs.) “England, my friend says. Well, that is the next best, I grant; but I think we have improved upon England. Statesmen tried their apprentice hand on the Government of England, and then ours was made. Ours sprang from that, avoiding many of its defects, taking most of the good, and leaving out many of its errors, and, from the whole, constructing and building up this model Republic—the best which the history of the world gives any account of.

“Compare, my friends, this Government with that of Spain, Mexico, the South American Republics, Germany, Ireland—are there any sons of that down-trodden nation here to-night?—Prussia, or, if you travel further East, to Turkey or China. Where will you go, following the sun in his circuit round our globe, to find a Government that better protects the liberties of its people, and secures to them the blessings we enjoy? I think that one of the evils that beset us is a surfeit of liberty, an exuberance of the priceless blessings for which we are ungrateful.

"When I look around and see our prosperity in everything—agriculture, commerce, art, science, and every department of education, physical and mental, as well as moral advancement, and our colleges—I think, in the face of such an exhibition, if we can, without the loss of power, or any essential right or interest, remain in the Union, it is our duty to ourselves and to posterity to—let us not too readily yield to this temptation—do so. Our first parents, the great progenitors of the human race, were not without a like temptation when in the Garden of Eden. They were led to believe that their condition would be bettered—that their eyes would be opened—and that they would become as gods. They in an evil hour yielded. Instead of becoming gods, they only saw their own nakedness.

"I look upon this country, with our institutions, as the Eden of the world, and the paradise of the Universe. It may be that out of it we may become greater and more prosperous, but I am candid and sincere in telling you that I fear if we rashly evince passion, and, without sufficient cause, shall take that step, that instead of becoming greater or more peaceful, prosperous and happy—instead of becoming gods—we will become demons, and, at no distant day, commence cutting one another's throats."

Still speaking of our Government, he says:

"Thus far, it is a noble example, worthy of imitation. The gentleman (Mr. Cobb) the other night said it had proven a failure. A failure in what? In growth? Look at our expanse in national power. Look at our population and increase in all that makes a people great. A failure? Why, we are the admiration of the civilized world, and present the brightest hopes of mankind.

"Some of our public men have failed in their aspirations; that is true, and from that comes a great part of our troubles.

"No, there is no failure of this Government yet. We have made great advancement under the Constitution, and



I cannot but hope that we shall advance higher still. Let us be true to our cause."

Now, wherein is it that this Government deserves these encomiums, which come from the intelligent and profound wisdom of statesmen, and gush spontaneously from the unlearned hearts of the masses of the people? Why, it is precisely in this point, of its not being a consolidated Government, and of its not being a narrow and feeble, and weak community and Government. Indeed, I may be permitted to say that I once heard, from the lips of Mr. Calhoun himself, this recognition, both of the good fortune of this country in possessing such a Government, and of the principal sources to which the gratitude of a nation should attribute that good fortune. I heard him once say, that it was to the wisdom, in the great Convention, of the delegates from the State of Connecticut, and of Judge Patterson, a delegate from the State of New Jersey, that we owed the fact that this Government was what it was, the best Government in the world, a confederated Government, and not what it would have been—and, apparently would have been but for those statesmen—the worst Government in the world—a consolidated Government. These statesmen, he said, were wiser for the South than the South was for herself.

I need not say to you, gentlemen, that, if all this encomium on the great fabric of our Government is brought to naught, and is made nonsense by the proposition that, although thus praised and thus admired, it contains within itself the principle, the right, the duty, of being torn to pieces, whenever a fragment of its people shall be discontented and desire its destruction, then all this encomium comes but as sounding brass and a tinkling cymbal; and the glory of our ancestors, Washington, and Madison, and Jefferson, and Adams—the glory of their successors, Webster, and Clay, and Wright, and even Calhoun—for he was no votary of this nonsense of secession—passes away, and their

fame grows visibly paler, and the watchful eye of the English monarchy looks on for the bitter fruits to be reaped by us for our own destruction, and as an example to the world—the bitter fruits of the principle of revolution and of the right of self-government which we dared to assert against her perfect control. Pointing to our exhibition of an actual concourse of armies, she will say—"It is in the dragon's teeth, in the right of rebellion against the monarchy of England, that these armed hosts have found their seed and sprung upon your soil."

Now, gentlemen, such is our Government, such is its beneficence, such is its adaptation, and such are its successes. Look at its successes. Not three-quarters of a century have passed away since the adoption of its Constitution, and now it rules over a territory that extends from the Atlantic to the Pacific. It fills the wide belt of the earth's surface that is bounded by the provinces of England on the North, and by the crumbling, and weak, and contemptible Governments or no Governments that shake the frame of Mexico on the South. Have Nature and Providence left us without resources to hold together social unity, notwithstanding the vast expanse of the earth's surface which our population has traversed and possessed? No. Keeping pace with our wants in that regard, the rapid locomotion of steam on the ocean, and on our rivers and lakes, and on the iron roads that bind the country together, and the instantaneous electric communication of thought, which fills with the same facts, and with the same news, and with the same sentiments, at the same moment, a great, enlightened, and intelligent people, have overcome all the resistance and all the dangers which might be attributed to natural obstructions. Even now, while this trial proceeds, San Francisco and New York, Boston and Portland, and the still farther East, communicate together as by a flash of lightning—indeed, it may be said, making an electric flash farther across the earth's sur-

face, and more intelligible too, to man, than ever in the natural phenomena of the heavens the lightning displayed itself. No—the same Author of all good, to whom Pinckney avowed his gratitude, has been our friend and protector, and has removed, step by step, every impediment to our expansion which the laws of nature and of space had been supposed to interpose. No, no—neither in the patriotism nor in the wisdom of our fathers was there any defect; nor shall we find, in the disposition and purposes of Divine Providence, as we can see them, any excuse or any aid for the destruction of this magnificent system of empire. No—it is in ourselves, in our own time, and in our own generation, in our own failing powers and failing duties, that the crash and ruin of this magnificent fabric, and the blasting of the future hopes of mankind, is to find its cause and its execution.

I have shown you, gentlemen, how, when the usurpations of the British Parliament, striking at the vital point of the independence of this country, had raised for consideration and determination, by a brave and free people, the question of their destiny, our fathers dealt with it. My learned friends, in various forms, have spoken poetically, logically and practically about all that course of proceedings that has been going on in this country, as finding a complete parallelism, support, and justification in the course of the American Revolution; and a passage in the Declaration of Independence has been read to you as calculated to show that, on a mere theoretical opinion of the right of a people to govern themselves, any portion of that people are at liberty, as well against a good Government as against a bad one, to establish a bad Government as well as overthrow a bad Government—have the right to do as they please, and, I suppose, to force all the rest of the world and all the rest of the nation to just such a fate as their doing as they please may bring with it.

Let us see how this Declaration of Independence, called by the great forensic orator, Mr. Choate, "a passionate and eloquent manifesto," and stigmatized as containing "glittering generalities"—let us see, I say, how sober, how discreet, how cautious it is in the presentation of this right, even of revolution. I read what, both in the newspapers and in political discussions, as well as before you, by the learned counsel, have been presented as the doctrines of the Declaration of Independence, and then I add to it the qualifying propositions, and the practical, stern requisitions, which that instrument appends to these general views:

"To secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that Governments long established should not be changed for light and transient causes. And, accordingly, all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such Government, and to provide new guards for their future security. Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world."

And it then proceeds to enumerate the facts, in the eloquent language of the Declaration, made familiar to us all by its repeated and reverent recitals on the day which celebrates its adoption. There is not anything of moonshine about any one of them. There is not anything, perhaps, of, or anticipation of, fear or suspicion. There is not anything of this or that newspaper malediction, of this or that rhetorical disquisition, of this or that theory, or of this or that opprobrium, but a recital of direct governmental acts of Great Britain, all tending to the purpose of establishing complete despotism over this country. And, then, even that not being deemed sufficient, on the part of our great ancestors, to justify this appeal to the enlightened opinion of the world, and to the God who directs the fate of armies, they say:

“In every stage of these oppressions, we have petitioned for redress, in the most humble terms; our repeated petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

“Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts by their Legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow those usurpations, which would inevitably interrupt our connection and correspondence. They, too, have been deaf to the voice of justice and of consanguinity.”

Now, gentlemen, this doctrine of revolution, which our learned friends rely upon, appeals to our own sense of right and duty. It rests upon facts, and upon the purpose, as indicated by these facts, to deprive our ancestors of the

rights of Englishmen, and to subject them to the power of a Government in which they were not represented. Now, whence come the occasions and the grievances urged before you, and of what kind are they? My learned friend, Mr. Brady, has given you a distinct enumeration, under nine heads, of what the occasions are, and what the grievances are. There is not one of them that, in form or substance, proceeded from the Federal Government. There is not a statute, there is not a proclamation, there is not an action, judicial, executive, or legislative, on the part of the Federal Government, that finds a place, either in consummation or in purpose, in this indictment drawn by my learned friend Mr. Brady against the Government, on behalf of his clients. The letter of South Carolina, on completing the revocation of her adoption of the Constitution, addressed to the States, dwells upon the interest of slavery (as does my friend Mr. Brady, in all his propositions), and discloses but two ideas—one, that when any body or set of people cease to be a majority in a Government, they have a right to leave it; and the other, that State action, on the part of some of the Northern States, had been inconsistent with, threatening to, or opprobrious of the institution of slavery in the Southern States.

Let me ask your attention to this proposition of the Southern States, and this catalogue of the learned counsel. As it is only the interest of slavery, social and political (for it is an interest, lawfully existing), that leads to the destruction of our Government and of their Government, let us see what there is in the actual circumstances of this interest, as being able, under the forms of our Constitution, to look out for itself, as well, at least, as any other interest in the country, that can justify them in finding an example or a precedent in the appeal of our fathers to arms to assert their rights by the strong hand, because in the Government of England they had no representation. Did our fathers say

that, because they had not a majority in the English Parliament, they had a right to rebel? No! They said they had not a share or vote in the Parliament. That was their proposition.

I now invite you to consider this fundamental view of the right and power of Government, and the right and freedom of the people,—to wit, that every citizen is entitled to be counted and considered as good as every other citizen,—as a natural and abstract right—as the basis of our Government, however other arrangements may have adjusted or regulated that simple and abstract right. Then, let us see whether the arrangement of the Federal Government, in departing from that natural right of one man to be as good as another, and to be counted equal in the representation of his Government, has operated to the prejudice of the interest of slavery. We have not heard anything in this country of any other interest for many a long year,—much to my disgust and discontent. There are other interests,—manufacturing interests, agricultural interests, commercial interests, all sorts of interests, some of them discordant, if you please. Let us see whether this interest of slavery has a fair chance to be heard, and enjoys its fair share of political power under our Government, or whether, from a denial to it of its fair share, it has some pretext for appealing to force. Why, gentlemen, take the fifteen Slave States, which, under the census of 1850, had six millions of white people—that is, of citizens—and, under the census of 1860, about eight millions, and compare them with the white people of the State of New York, which, under the census of 1850, had three millions, and, under the census of 1860, something like four millions.

Now, here we are,—they as good as we, and we as good as they,—we having our interests, and opinions, and feelings—they their opinions, interests, and feelings,—and let us see how the arrangement of representation, in every part of

our Government, is distributed between these interests. Why, with a population just double that of the State of New York, the interest of slavery has *thirty* Senators to vote and to speak for it, and the people of New York have *two* Senators to vote and to speak for them. In the House of Representatives these same Slave States have *ninety* Representatives to speak and to vote for them; and the people of the State of New York have *thirty-three* to vote and to speak for them. And, in the Electoral College, which raises to the chief magistracy the citizen who receives the constitutional vote, these same States have *one hundred and twenty* electoral votes, and the State of New York has *thirty-five*. Why, the three coterminous States—New York, Pennsylvania, and Ohio—have, under either census, as great or a greater population than the fifteen Slave States, and they have but six Senators, against the Slave States' thirty.

Do I mention this in complaint? Not in the least. I only mention it to show you that the vote and the voice of this interest has not been defrauded in the artificial distribution of Federal power. And, if I may be allowed to refer to the other august department of our Federal Government, the Supreme Court of the United States, in which the Presiding Justice has his seat as one of the members of that Court, you will see how the vast population, the vast interests of business, commerce, and what not, that reside in the Free States, as compared with the lesser population, the lesser business, and the lesser demand for the authority or intervention of the judiciary in the Slave States, have been represented for years, by the distribution of the nine Judges of that Court, so that the eighteen millions of white people who compose the population of the Free States have been represented (not in any political sense) by four of these Justices; and the rest of the country, the fifteen Slave States, with their population of six or eight millions, have



been represented by five. Now, of this I do not complain. It is law—it is government; and no injustice has been done to the Constitution, nor has it been violated in this arrangement. But, has there been any fraud upon the interest of slavery, in the favor the Federal Government has shown in the marking out of the Judicial Districts, and in the apportionment of the Judges to the different regions of the country, and to the population of those regions? If you look at it as regards the business in the different Circuits, the learned Justice who now presides here, and who holds his place for the Second Circuit including our State, disposes annually, here and in other Courts, of more business than, I may perhaps say, all the Circuits that are made up from the Slave States. And, if you look at it as regards the population, there was one Circuit—that which was represented by the learned Mr. Justice McLean, lately deceased—which contained within itself five millions of white, free population; while one other Circuit, represented by another learned Justice, lately deceased—a Circuit composed of Mississippi and Arkansas—contained only 450,000, at the time of the completion of the census of 1850. Who complains of this? Do we? Never. But, when it is said to you that there is a parallelism between the right of revolt, because of lack of representation, in the case of our people and the Parliament of England, and the case of these people and the United States, or any of the forms of its administration of power, remember these things. I produce this in the simple duty of forensic reply to the causes put forward as a justification of this revolt—that is to say that, the Government oppressing them, or the Government closed against them, and they excluded from it, they had a right to resort to the revolution of force.

You, therefore, must adopt the proposition of South Carolina, that, when any interest ceases to be the majority in a Government, it has a right to secede. How long would

such a Government last? Why, there was never any interest in this country which imagined that it had a majority. Did the tariff interest have a majority? Did the grain interest have a majority? Did the commercial interest have a majority? Did the States of the West have a majority? Does California gold represent itself by a majority? Why, the very safety of such a Government as this, is, that no interest shall or can be a majority; but that the concurring, consenting wisdom drawn out of these conflicting interests shall work out a system of law which will conduce to the general interest.

Now, that I have not done my learned friend, Mr. Brady, any injustice in presenting the catalogue of grievances (not in his own view, but in the view of those who have led in this rebellion), let us see what they are:

“The claim to abolish slavery.” Is there any statute of the United States anywhere that has abolished it? Has any Act been introduced into Congress to abolish it? Has the measure had a vote?

“Stoppage of the inter-state slave-trade.” I may say the same thing of that.

“No more slavery in the Territories.” Where is the Act of Congress, where is the movement of the Federal Government, where the decision of the Supreme Court, that holds that slavery cannot go into a territory? Why, so far as acts go, everything has gone in the way of recognizing the confirmation of the right—the repeal of the Missouri Compromise by Congress, and the decision of the Federal Court, if it go to that extent, as is claimed, in the case of Dred Scott.

“Nullification of the fugitive-slave law.” Who passed the fugitive-slave law? Congress. Who have enforced it? The Federal power, by arms, in the city of Boston. Who have enjoined its observation, to Grand Juries and to Juries? The Justices of the Supreme Court of the United States, in their Circuits. Who have held it to be constitutional?

The Supreme Court of the United States, and the subordinate Courts of the United States, and every State Court that has passed upon the subject, except it be the State Court of the State of Wisconsin, if I am correctly advised.

"Underground railroads, supported by the Government, and paid by them." Are they? Not in the least.

"The case of the *Creole*"—where, they say, no protection was given to slaves on the high seas. Is there any judicial interpretation to that effect? Nothing but the refusal of Congress to pass a bill, under some circumstances of this or that nature, presented for its consideration; and, because it has refused, it is alleged there is the assertion of some principle that should charge upon this Government the inflamed and particular views generally maintained on slavery by Garrison, Phillips, and Theodore Parker. The other enormities they clothe in general phrase, and do not particularly specify, except one particular subject—what is known as the "John Brown raid"—in regard to which, as it has been introduced, I shall have occasion to say something in another connection, and, therefore, I will not comment upon it now.

I find, however, I have omitted the last—Mr. Lincoln's doctrine, that it is impossible, theoretically, for slave and free States to co-exist. For many years, that was considered to be Mr. Seward's doctrine, but, when Mr. Lincoln became a candidate for the Presidency, it was charged on him, being supported by some brief extracts from former speeches made by him in canvassing his State. I cannot discuss all these matters. They are beneath the gravity of State necessity, and of the question of the right of revolution. They are the opinions, the sentiments, the rhetoric, the folly, the local rage and madness, if you please, in some instances, of particular inflammations, either of sentiment or of action, rising in the bosom of so vast, so impetuous a community as ours. But, suppose the tariff States, suppose the grain States, were to attempt to topple down

the Government, and maintain a separate and sectional independence upon their interests, of only the degree and gravity, and resting in the proof of facts like these! Now, for the purpose of the argument, let us suppose all these things to be wrong. My learned friends, who have made so great and so passionate an appeal that individual lives should not be sacrificed for opinion, certainly might listen to a proposition that the life of a great nation should not be destroyed on these questions of the opinions of individual citizens. No—you never can put either the fate of a nation that it must submit, or the right of malcontents to assert their power for its overthrow, upon any such proposition, of the ill-working, or of the irritations that arise, and do not come up to the effect of oppression, in the actual, the formal, and the persistent movement of Government. Never for an instant. For that would be, what Mr. Stephens has so ably presented the folly of doing, to require that a great Government, counting in its population thirty millions of men, should not only be perfect in its design and general form and working, but that it should secure perfect action, perfect opinions, perfect spirit and sentiments from every one of its people—and that, made out of mere imperfect individuals who have nothing but poor human nature for their possession, it should suddenly become so transformed, as to be without a flaw, not only in its administration, but in the conduct of everybody under it.

Now, my learned friends, pressed by this difficulty as to the sufficiency of the causes, are driven finally to this—that there is a right of revolution when anybody thinks there is a right of revolution, and that that is the doctrine upon which our Government rests, and upon which the grave, serious action of our forefathers proceeded. And it comes down to the proposition of my learned friend, Mr. Brady, that it all comes to the same thing, the *power* and the *right*. All the argument, most unquestionably, comes

to that. But do morals, does reason, does common sense recognize that, because power and right may result in the same consequences, therefore there is no difference in their quality, or in their support, or in their theory? If I am slain by the sword of justice for my crime, or by the dagger of an assassin for my virtue, I am dead, under the stroke of either. But is one as right as the other? An oppressive Government may be overthrown by the uprising of the oppressed, and Lord Camden's maxim may be adhered to, that "when oppression begins, resistance becomes a right;" but a Government, beneficent and free, may be attacked, may be overthrown by tyranny, by enemies, by mere power. The Colonies may be severed from Great Britain, on the principle of the right of the people asserting itself against the tyranny of the parent Government; and Poland may be dismembered by the interested tyranny of Russia and Austria; and each is a revolution and destruction of the Government, and its displacement by another—a dismemberment of the community, and the establishment of a new one under another Government. But, do my learned friends say that they equally come to the test of power as establishing the right? Will my learned friend plant himself, in justification of this dismemberment of a great, free, and prosperous people, upon the example of the dismemberment of Poland, by the introduction of such influences within, and by the co-operation of such influences without, as secured that result? Certainly not. And yet, if he puts it upon the right and the power, as coming to the same thing, it certainly cannot make any difference whether the power proceeds from within or from without. There is no such right. Both the public action of communities and the private action of individuals must be tried, if there is any trial, any scrutiny, any judgment, any determination, upon some principles that are deeper than the question of counting bayonets. When we are referred to the case of Victor

Emmanuel overthrowing the throne of the King of Naples, and thus securing the unity of the Italian people under a benign Government, are we to be told that the same principle and the same proposition would have secured acceptance before the forum of civilization, and in the eye of morality, to a successful effort of the tyrant of Naples to overthrow the throne of Victor Emmanuel, and include the whole of Italy under his, King Bomba's, tyranny? No one. The quality of the act, the reason, the support, and the method of it, are traits that impress their character on those great public and national transactions as well as upon any other.

There is but one proposition, in reason and morality, beyond those I have stated, which is pressed for the extrication and absolution of these prisoners from the guilt that the law, as we say, impresses upon their action and visits with its punishment. It is said that, however little, as matter of law, these various rights and protections may come to, good faith, or sincere, conscientious conviction on the part of these men as to what they have done, should protect them against the public justice.

Now, we have heard a great deal of the assertion and of the execration of the doctrine of the "higher law," in the discussions of legislation, and in the discussions before the popular mind; but I never yet have heard good faith or sincere opinion pressed, in a Court of Justice, as a bar to the penalty which the law has soberly affixed, in the discreet and deliberate action of the Legislature. And here my learned friend furnishes me, by his reference to the grave instance of injury to the property, and the security, and the authority of the State of Virginia, which he has spoken of as "John Brown's raid," with a ready instance, in which these great principles of public justice, the authority of Government, and the sanctions of human law were met, in the circumstances of the transaction, by a complete, and thorough, and

remarkable reliance, for the motive, the support, the stimulus, the solace, against all the penalties which the law had decreed for such a crime, on this interior authority of conscience, and this supremacy of personal duty, according to the convictions of him who acts. The great State of Virginia administered its justice, and it found, as its principal victim, this most remarkable man, in regard to whom it was utterly impossible to impute anything like present or future, near or remote, personal interest or object of any kind—a man in regard to whom Governor Wise, of Virginia, said, in the very presence of the transaction of his trial, that he was the bravest, the sincerest, the truthfulest man that he ever knew. And now, let us look at the question in the light in which our learned friend presents it—that John Brown, as matter of theoretical opinion of what he had a right to do, under the Constitution and laws of his country, was justified, upon the pure basis of conscientious duty to God—and let us see whether, before the tribunals of Virginia, as matter of fact, or matter of law, or right, or duty, any recognition was given to it. No. John Brown was not hung for his theoretical heresies, nor was he hung for the hallucinations of his judgment and the aberration of his wrong moral sense, if you so call it, instead of the interior light of conscience, as he regarded it. He was hung for attacking the sovereignty, the safety, the citizens, the property, and the people of Virginia. And, when my learned friend talks about this question of hanging for political, moral, or social heresy, and that you cannot thus coerce the moral power of the mind, he vainly seeks to beguile your judgment. When Ravallae takes the life of good King Henry of France, is it a justification that, in the interests of his faith, holy to him—of the religion he professed—he felt impelled thus to take the life of the monarch? When the assassin takes, at the door of the House of Commons, the life of the Prime Minister, Mr. Percival, because he thinks that the course of measures

his administration proposes to carry out is dangerous to the country, and falls a victim to violated laws, I ask, in the name of common sense and common fairness—are these executions to be called hanging for political or religious heresies? No. And shall it ever be said that sincere convictions on these theories of secession and of revolution are entitled to more respect than sincere convictions and opinions on the subject of human rights? Shall it be said that faith in Jefferson Davis is a greater protection from the penalty of the law than faith in God was to John Brown or Francis Ravallae? But, gentlemen, it was said that certain isolated acts of some military or civil authority of the United States, or some promulgation of orders, or affirmation of measures by the Government, had recognized the belligerent right, or the right to be considered as a power fighting for independence, of this portion of our countrymen. The flags of truce, and the capitulation at Hatteras Inlet, and the announcement that we would not invade Virginia, but would protect the Capital, are claimed as having recognized this point. Now, gentlemen, this attempts either too much or too little. Is it gravely to be said that, when the Government is pressing its whole power for the restoration of peace and for the suppression of this rebellion, it is recognizing a right to rebel, or has liberated from the penalties of the criminal law such actors in it as it may choose to bring to punishment? Is it to be claimed here that, by reason of these proceedings, the Government has barred itself from taking such other proceedings, under the same circumstances, as it may think fit? Why, certainly not. The Government may, at any time, refuse to continue this amenity of flags of truce. It can, the next time, refuse to receive a capitulation as “prisoners of war,” and may, in any future action—as, indeed, in its active measures for the suppression of the rebellion it is doing—affirm its control over every part of the revolted regions of this country. There is nothing



in this fact that determines anything for the occasion, but the occasion itself. The idea that the commander of an expedition to Hatteras Inlet has it in his power to commit the Government, so as to empty the prisons, to overthrow the Courts, and to discharge Jurors from their duty, and criminals from the penalties of their crimes, is absurd.

I shall now advert to the opinion of Judge Cadwalader, on the trial in Philadelphia, and to the propositions of the counsel there, on behalf of the prisoners, as containing and including the general views and points urged, in one form or another, and with greater prolixity, at least, if not earnestness and force, by the learned counsel who defend the prisoners here. It will be found that those points cover all these considerations:

*First.* If the Confederate States of America is a Government, either *de facto* or *de jure*, it had a right to issue letters of marque and reprisal; and if issued before the commission of the alleged offence, that the defendant, acting under the authority of such letters, would be a privateer, and not a pirate, and, as such, is entitled to be acquitted.

*Second.* That if, at the time of the alleged offence, the Southern Confederacy, by actual occupation, as well as acts of Government, had so far acquired the mastery or control of the particular territory within its limits as to enable it to exercise authority over, and to demand and exact allegiance from, its residents, that then a resident of such Confederacy owes allegiance to the Government under which he lives, or, at least, that by rendering allegiance to such Government, whether on sea or land, he did not thereby become a traitor to the Government of the United States.

*Third.* That if, at the time of the alleged offence and the issuing of the letters of marque and reprisal upon which the defendant acted, the Courts of the United States were so suspended or closed in the Southern Confederacy, as to be no longer able to administer justice and enforce the law in

such Confederacy, that the defendant thereby became so far absolved from his allegiance to the United States as to enable him to take up arms for, and to enter the service of, the Southern Confederacy, either on land or sea, without becoming a traitor to the Government of the United States.

*Fourth.* That if, at the time of the alleged offence and his entering into the service of the Southern Confederacy, the defendant was so situated as to be unable to obtain either civil or military protection from the United States, whilst at the same time he was compelled to render either military or naval service to the Southern Confederacy, or to leave the country, and, in this event, to have his property sequestered or confiscated by the laws of the said Confederacy, that such a state of things, if they existed, would amount in law to such duress as entitles the defendant here to an acquittal.

*Fifth.* That this Court has no jurisdiction of the case, because the prisoner, after his apprehension on the high seas, was first brought into another District, and ought to have been there tried.

And now, gentlemen, even a more remote, unconnected topic, has been introduced into this examination, and discussed and pursued with a great deal of force and feeling, by my learned friend, Mr. Brady; and that is, what this war is for, and what is expected to be accomplished by it. Well, gentlemen, is your verdict to depend upon any question of that kind? Is it to depend either upon the purpose of the Government in waging the war, or upon its success in that purpose? If so, the trial had been better postponed to the end of the war, and then you will find your verdict in the result. What is the meaning of this? Let those who began the war say what the war is for. Is it to overthrow this Government and to dismember its territory? Is it to acquire dominion over as large a portion of what constitutes the possessions of the American people, and over as large a share of its population, as the policy or the military power

of the interest that establishes for itself an independent Government, for its own protection, can accomplish? Who are seeking to subjugate, and who is seeking to protect? No subjugation is attempted or desired, in respect of the people of these revolting States, except that subjugation which they themselves made for themselves when they adopted the Constitution of the United States, and thanked God, with Charles Cotesworth Pinckney, that his blessing permitted them to do so,—and, up to this time, with Alexander Stephens, have found it to be a Government that can only be likened, on this terrestrial sphere, to the Eden and Paradise of the nations of men. What is the interest that is seeking to wrest from the authority of that benign Government portions of its territory and authority, but the social and political interest of slavery, about which I make no other reproach or question than this—that it has purposes, and objects, and principles which do not consult the general or equal interests of the population of these revolting States themselves, nor contemplate a form of Government that any Charles Cotesworth Pinckney, now, or any Alexander Stephens, hereafter, can thank God for having been permitted to establish; and that, as Mr. Stephens has said, instead of becoming gods, by bursting from the restraints of this Eden, they will discover their own nakedness, and, instead of finding peace and prosperity, they will come to cutting their own throats.

Now, what is the duty of a Government that finds this assault made by the hands of terror and of force against the judgment and wishes of the discreet, sober, and temperate, at least, to those to whom it owes protection, as they owe allegiance to it? What, but to carry on, by the force of the Government, the actual suppression of the rebellion, so that arms may be laid down, peace may exist, and the law and the Constitution be reinstated, and the great debate of opinion be restored, that has been interrupted by this vehe-

ment recourse to arms? What, but to see to it that, instead of the consequences of this revolt being an expulsion, from this Paradise of free Government, of these people whom we ought to keep within it, it shall end in the expulsion of that tempting serpent—be it secession or be it slavery—that would drive them out of it. Government has duties, gentlemen, as well as rights. If our lives and our property are subject to its demands under the penal laws, or for its protection and enforcement as an authority in the world, it carries to every citizen, on the farthest sea, in the humblest schooner, and to the great population of these Southern States in their masses at home, that firm protection which shall secure him against the wicked and the willful assaults, whether it be of a pirate on a distant sea, or of an ambitious and violent tyranny upon land. When this state of peace and repose is accomplished by Conventions, by petitions, by representations against Federal laws, Federal oppressions, or Federal principles of Government, the right of the people to be relieved from oppression is presented; and then may the spirit and the action of our fathers be invoked, and their condemnation of the British Parliament come in play, if we do not do what is right and just in liberating an oppressed people. But I need not say to you that the whole active energies of this system of terror and of force in the Southern states have been directed to make impossible precisely the same debate, the same discussion, the same appeal, and the same just and equal attention to the appeal. And you will find this avowed by many of their speakers and many of their writers—as, when Mr. Toombs interrupts Mr. Stephens in the speech I have quoted from, when urging that the people of Georgia should be consulted, by saying: “I am afraid of Conventions and afraid of the people; I do not want to hear from the cross-roads and the groceries,” which are the opportunities of public discussion and influence, it appears, in the State of Georgia. That is exactly what they

did not want to hear from; and their rash withdrawal of this great question from such honest, sensible consideration, will finally bring them to a point that the people, interested in the subject, will take it by force; and then, besides their own nakedness, which they have now discovered, the second prophecy of Mr. Stephens, that they will cut their own throats, will come about; and nothing but the powerful yet temperate, the firm yet benign, authority of this Government, compelling peace upon these agitations, will save those communities from social destruction and from internecine strife at home.

Now, having such an object, can it be accomplished? It cannot, unless you try; and it cannot, if every soldier who goes into the field concludes that he will not fire off his gun, for it is uncertain whether it will end the war; or if, on any post of duty that is devolved upon citizens in private life, we desert our Government, and our full duty to the Government. But that it can be done, and that it will be done, and that all this talk and folly about conquering eight millions of people will result in nothing, I find no room to doubt. In the first place, where are your eight millions? Why, there are the fifteen Slave States, and four of them—Maryland, Delaware, Kentucky, and Missouri—are not yet within the Confederacy. So we will subtract three millions, at least, for that part of the concern. Then there are five millions to be conquered; and how are they to be conquered? Why, not by destruction, not by slaughter, not by chains and manacles; but by the impression of the power of the Government, showing that the struggle is vain, that the appeal to arms was an error and a crime, and that, in the region of debate and opinion, and in equal representation in the Government itself, is the remedy for all grievances and evils. Be sure that, whatever may be said or thought of this question of war, these people can be, not subjugated, but compelled to entertain those inquiries by peaceful

means; and I am happy to be able to say that the feeble hopes and despairing views which my learned friend, Mr. Brady, has thought it his duty to express before you, as to the hopelessness of any useful result in these hostilities, is not shared by one whom my friend, in the eloquent climax to an oration, placed before us as "starting, in a red shirt, to secure the liberties of Italy." I read his letter:

"CAPRERA, Sept. 10.

*"Dear Sir:* I saw Mr. Sanford, and regret to be obliged to announce to you that I shall not be able to go to the United States at present. I do not doubt the triumph of the cause of the Union, and that shortly; but, if the war should unfortunately continue in your beautiful country, I shall overcome the obstacles which detain me and hasten to the defence of a people who are dear to me.

"G. GARIBALDI."

Garibaldi has had some experience, and knows the difference between efforts to make a people free, and the warlike and apparently successful efforts of tyranny; and he knows that a failure, even temporary, does not necessarily secure to force, and fraud, and violence a permanent success. He knows the difference between restoring a misguided people to a free Government, and putting down the efforts of a people to get up a free Government. He knows those are two different things; and, if the war be not shortly ended, as he thinks it will be, then he deems it right for him, fresh from the glories of securing the liberties of Italy, to assist in maintaining—what? Despotism? No! the liberties of America.

One of the learned counsel, who addressed you in a strain of very effective and persuasive eloquence, charmed us all by the grace of his allusion to a passage in classical history, and recalled your attention to the fact that, when the States of Greece which had warred against Athens, anticipating her downfall beneath the prowess of their arms, met to determine

her fate, and when vindictive Thebes and envious Corinth counseled her destruction, the genius of the Athenian Sophocles, by the recital of the chorus of the Electra, disarmed this cruel purpose, by reviving the early glories of united Greece. And the counsel asked that no voice should be given to punish harshly these revolted States, if they should be conquered.

The voice of Sophocles, in the chorus of the Electra, and those glorious memories of the early union, were produced to bring back into the circle of the old confederation the erring and rebellious Attica. So, too, what shall we find in the memories of the Revolution, or in the eloquence with which we have been taught to revere them, that will not urge us all, by every duty to the past, to the present, and to the future, to do what we can, whenever a duty is reposed in us, to sustain the Government in its rightful assertion of authority and in the maintenance of its power? Let me ask your attention to what has been said by the genius of Webster, on so great a theme as the memory of Washington, bearing directly on all these questions of union, of glory, of hope, and of duty, which are involved in this inquiry. See whether, from the views thus invoked, there will not follow the same influence as from the chorus of the Electra, for the preservation, the protection, the restoration of every portion of what once was, and now is, and, let us hope, ever shall be, our common country.

On the occasion of the centennial anniversary of the birthday of Washington, at the national Capitol, in 1832, Mr. Webster, by the invitation of men in public station as well as of the citizens of the place, delivered an oration, about which I believe the common judgment of his countrymen does not differ from what is known to have been his own idea, that it was the best presentation of his views and feelings which, in the long career of his rhetorical triumphs, he had had the opportunity to make.

No man ever thought or spoke of the character of Washington, and of the great part in human affairs which he played, without knowing and feeling that the crowning glory of all his labors in the field and in the council, and the perpetual monument to his fame, if his fame shall be perpetual, would be found in the establishment of the American Union under the American Constitution. All the prowess of the war, all the spirit of the Revolution, all the fortitude of the effort, all the self-denial of the sacrifice of that period, were for nothing, and worse than nothing, if the result and consummation of the whole were to be but a Government that contained within itself the seeds of its own destruction, and existed only at the caprice and whim of whatever part of the people should choose to deny its rightfulness or seek to overthrow its authority. In pressing that view, Mr. Webster thus attracts the attention of his countrymen to the great achievements in human affairs which the establishment of this Government has proved to be, and thus illustrates the character of Washington:

“It was the extraordinary fortune of Washington that, having been intrusted, in revolutionary times, with the supreme military command, and having fulfilled that trust with equal renown for wisdom and for valor, he should be placed at the head of the first Government in which an attempt was to be made, on a large scale, to rear the fabric of social order on the basis of a written Constitution and of a pure representative principle. A Government was to be established, without a throne, without an aristocracy, without castes, orders, or privileges; and this Government, instead of being a democracy, existing and acting within the walls of a single city, was to be extended over a vast country, of different climates, interests and habits, and of various communions of our common Christian faith. The experiment certainly was entirely new. A popular Government of this extent, it was evident, could be framed only by carrying into full effect



the principle of representation or of delegated power; and the world was to see whether society could, by the strength of this principle, maintain its own peace and good government, carry forward its own great interests, and conduct itself to political renown and glory.

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"I remarked, gentlemen, that the whole world was and is interested in the result of this experiment. And is it not so? Do we deceive ourselves, or is it true that at this moment the career which this Government is running is among the most attractive objects to the civilized world? Do we deceive ourselves, or is it true that at this moment that love of liberty and that understanding of its true principles, which are flying over the whole earth, as on the wings of all the winds, are really and truly of American origin?

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"Gentlemen, the spirit of human liberty and of free Government, nurtured and grown into strength and beauty in America, has stretched its course into the midst of the nations. Like an emanation from Heaven, it has gone forth, and it will not return void. It must change, it is fast changing, the face of the earth. Our great, our high duty, is to show, in our own example, that this spirit is a spirit of health as well as a spirit of power; that its longevity is as great as its strength; that its efficiency to secure individual rights, social relations, and moral order, is equal to the irresistible force with which it prostrates principalities and powers. The world at this moment is regarding us with a willing, but something of a fearful, admiration. Its deep and awful anxiety is to learn whether free States may be stable as well as free; whether popular power may be trusted, as well as feared; in short, whether wise, regular, and virtuous self-government is a vision for the contemplation of theorists, or a truth established, illustrated, and brought into practice in the country of Washington.

"Gentlemen, for the earth which we inhabit, and the whole circle of the sun, for all the unborn races of mankind, we seem to hold in our hands, for their weal or woe, the fate of this experiment. If we fail, who shall venture the repetition? If our example shall prove to be one, not of encouragement, but of terror, not fit to be imitated, but fit only to be shunned, where else shall the world look for free models? If this great *Western Sun* be struck out of the firmament, at what other fountain shall the lamp of liberty hereafter be lighted? What other orb shall emit a ray to glimmer, even, on the darkness of the world?

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"The political prosperity which this country has attained and which it now enjoys, has been acquired mainly through the instrumentality of the present Government. While this agent continues, the capacity of attaining to still higher degrees of prosperity exists also. We have, while this lasts, a political life capable of beneficial exertion, with power to resist or overcome misfortunes, to sustain us against the ordinary accidents of human affairs, and to promote, by active efforts, every public interest. But dismemberment strikes at the very being which preserves these faculties. It would lay its rude and ruthless hand on this great agent itself. It would sweep away, not only what we possess, but all power of regaining lost, or acquiring new, possessions. It would leave the country, not only bereft of its prosperity and happiness, but without limbs, or organs, or faculties by which to exert itself hereafter in the pursuit of that prosperity and happiness.

"Other misfortunes may be borne, or their effects overcome. If disastrous war should sweep our commerce from the ocean, another generation may renew it; if it exhaust our treasury, future industry may replenish it; if it desolate and lay waste our fields, still, under a new cultivation, they will grow green again, and ripen to future harvests. It were but

a trifle even if the walls of yonder Capitol were to crumble, if its lofty pillars should fall, and its gorgeous decorations be all covered by the dust of the valley. All these might be rebuilt. But who shall reconstruct the fabric of demolished Government? Who shall rear again the well-proportioned columns of constitutional liberty? Who shall frame together the skillful architecture which unites national sovereignty with State rights, individual security, and public prosperity? No, if these columns fall, they will be raised not again. Like the Coliseum and the Parthenon, they will be destined to a mournful, a melancholy immortality. Bitterer tears, however, will flow over them, than were ever shed over the monuments of Roman or Grecian art; for they will be the remnants of a more glorious edifice than Greece or Rome ever saw—the edifice of constitutional American liberty.

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“A hundred years hence other disciples of Washington will celebrate his birth, with no less of sincere admiration than we now commemorate it. When they shall meet, as we now meet, to do themselves and him that honor, so surely as they shall see the blue summits of his native mountains rise in the horizon, so surely as they shall behold the river on whose banks he lived, and on whose banks he rests, still flowing on toward the sea, so surely may they see, as we now see, the flag of the Union floating on the top of the Capitol; and then, as now, may the sun in his course visit no land more free, more happy, more lovely, than this our own country!”

If, gentlemen, the eloquence of Mr. Webster, which thus enshrines the memory and the great life of Washington, calls us back to the glorious recollections of the Revolution and the establishment of our Government, does it not urge every man everywhere that his share in this great trust is to be performed now or never, and wherever his fidelity and his

devotion to his country, its Government, and its spirit, shall place the responsibility upon him? It is not the fault of the Government, of the learned District Attorney, or of me, his humble associate, that this, your verdict, has been removed, by the course of this argument and by the course of this eloquence on the part of the prisoners, from the simple issue of the guilt or innocence of these men under the statute. It is not the action or the choice of the Government, or of its counsel, that you have been drawn into higher considerations. It is not our fault that you have been invoked to give, on the undisputed facts of the case, a verdict which shall be a recognition of the power, the authority, and the right of the rebel Government to infringe our laws, or partake in the infringement of them, to some form and extent. And now, here is your duty, here your post of fidelity—not against law, not against the least right under the law, but to sustain, by whatever sacrifice there may be of sentiment or of feeling, the law and the Constitution. I need not say to you, gentlemen, that if, on a state of facts which admits no diversity of opinion, with these opposite forces arrayed, as they now are, before you—the Constitution of the United States, the laws of the United States, the commission of this learned Court, derived from the Government of the United States, the venire and the empanneling of this Jury, made under the laws and by the authority of the United States, on our side—met, on their side, by nothing, on behalf of the prisoners, but the commission, the power, the right, the authority of the rebel Government, proceeding from Jefferson Davis—you are asked, by the law, or under the law, or against the law, in some form, to recognize this power, and thus to say that the folly and the weakness of a free Government find here their last extravagant demonstration, then you are asked to say that the vigor, the judgment, the sense, and the duty of a Jury, to confine themselves to their responsibility on the facts of the case, are worthless and yielding

before impressions of a discursive and loose and general nature. Be sure of it, gentlemen, that, on what I suppose to be the facts concerning this particular transaction, a verdict of acquittal is nothing but a determination that our Government and its authority, in the premises of this trial, for the purposes of your verdict, are met and overthrown by the protection thrown around the prisoners by the Government of the Confederate States of America, actual or incipient. Let us hope that you will do what falls to your share in the post of protection in which you are placed, for the liberties of this nation and the hopes of mankind; for, in surrendering them, you will be forming a part of the record on the common grave of the fabric of this Government, and of the hopes of the human race, where our flag shall droop, with every stripe polluted and every star erased, and the glorious legend of "Liberty and Union, now and forever, one and inseparable," replaced by this mournful confession, "Unworthy of freedom, our baseness has surrendered the liberties which we had neither the courage nor the virtue to love or defend."

### III

## ARGUMENT IN THE UNITED STATES SUPREME COURT ON BEHALF OF THE GOVERNMENT IN THE CASE OF PETER MILLER AND OTHERS, CLAIMANTS OF THE BARQUE HIA-WATHA, ETC., AGAINST THE UNITED STATES, AND OTHER CASES. (THE PRIZE CASES.)

### NOTE

What were known at the time, and are reported in the Supreme Court Reports, as the "Prize Cases" (2 Black, 635-699) arose very soon after the outbreak of the Civil War, from the capture by vessels of the United States Navy of vessels and cargoes, either on the high seas or in the course of attempted breach of the blockade of Southern ports, which had been established under the proclamations of President Lincoln. The vessels and cargoes in question were captured under claim of lawful prize under the laws of war and taken into the ports of the United States, where condemnation under the law of Prize Courts followed. The cases, four in number, came before the Supreme Court on appeals from the judgments of condemnation, two from the U. S. Circuit Court for the Southern District of New York, one from the United States District Court for the Southern District of Florida, and one from the United States Circuit Court for the District of Massachusetts. It was arranged with the Court by the various counsel engaged that argument upon all the cases should be had at the same time.

The general questions involved in the decision of these cases may be stated in the language of the Court at the very beginning of the opinion delivered by Mr. Justice Grier. The Court says: "There are certain propositions of law which must necessarily affect the ultimate decision of these cases and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each. They are:

1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the government,

on the principles of International Law, as known and acknowledged among civilized States?

2nd. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property"?

Mr. Evarts was retained by the Government in the court of first instance and in the Supreme Court in the two cases originating in New York. The case arising in the United States Circuit Court for the District of Massachusetts was conducted on behalf of the Government by Richard H. Dana, Jr., then U. S. District Attorney for Massachusetts, and involved the sole question of "enemies' property." Mr. Dana took a very prominent and effective part in the Argument before the Supreme Court, and added much to his reputation. The Argument in these cases occupied twelve days: February 10 to 13, 16 to 20 and 23 to 25, 1863, and the decision in favor of the Government's contention was rendered on the 10th of the following month. Mr. Evarts filed a general brief covering all the cases and made the argument that follows.

## ARGUMENT

### FIRST DAY

*May it please the Court:* Although the importance of the questions which have been presented, and properly presented, in the argument of this case before this Court cannot well be exaggerated, yet I am persuaded that whatever novelty attaches to them is to be found more in the attitude of our nation and our government to them than in the principles by which their decision is to be controlled; and the deep solicitude which watches the investigation and expects your just judgment is due much more to the vital interest that we all feel in them than to any difficulty which is to attend their solution. For war is no stranger on the theatre of human affairs; and whether it comes heralded and with acclaim or unbidden and unwelcome, it brings its whole train with it, and while it remains it is master of the scene.

War never comes till peace is gone, and peace never returns till war is over. They play no parts together on the same stage and at the same time. Brief as is the history of our own nation—not so long in its duration yet but that those who have reached the Homeric fame

“renowned for justice and for length of years”

have seen its origin and now may contemplate the menace of its end—yet it has had experience of every kind and form of war. It came into being through the war of the revolution, which was, in its origin, a civil war, and worked itself up only on the part of the revolting colonies to a public war through the successes of their arms; and never till its close, in the recognition by the parent government making our nationality wholly legitimate, was it esteemed by the other belligerent power as other in its character, or in the leading principles which should govern it, than a war of rebellion.

So too, we, as neutrals, during the long contest growing out of the French revolution, stood as witnesses of public war, in the attitude specially relevant to the public law governing public war, for our attitude as neutrals thus brought us in connection with it.

At the close of the century, in 1798–9, we were involved in partial or in perfect war with France, and then learned that while it was war, and while, to the extent and purport and purpose of its hostilities, it imported the law as well as the force of war, yet the national power which limited the extent and character and effort of the hostilities, regulated as well, by the same measure however and by that alone, the application of the laws of war.

In 1812, in the open and public war with England, we came fully under the jurisdiction of the law of nations in its simplest form of absolute, adverse belligerents.

During the civil commotions which raised the Spanish-American colonies into independent states—during their



war of independence, civil and public on one side or on the other—we, as neutrals, had our part to play, and most usefully we took the lead in establishing the principles and according to them the practical results which should govern such a contest as that.

In the war with Mexico, a war in self-defence, if you please, turned, as the Romans turned their wars of self-defence, into conquest, this Court had occasion to expound, to instruct the people, and to establish for the guidance of the future the principles which can govern a constitutional government and the application of all the powers of war—notwithstanding, a constitutional rule for its still proceeding into the domain of conquest.

And now we have the present war in which we occupy, in some sort at least,—to the apprehension of ourselves, perhaps, somewhat less than in the impartial observation of neutral nations—the attitude which Great Britain held to our struggle for independence, which Spain held to her revolted or warring colonies. It is true, in both of those contests there was present a marked fact, forming a leading feature of each of these transactions, which we miss here. The wide intervention of the ocean separating the revolting colonies, in one case and the other, from the parent country, and the separate and independent development under which the colonies in revolt had grown up, gave to those great transactions more the form of that struggle in the womb of the parent nation and that separation of the offspring of the mother which seemed a natural birth of a nation in progress of time. But, in this war, no such similes of hope and promise attend the contest. It is all of partition of a united people. It is a dismemberment of mutilation and of ruin. And though we thus find that the terrible traits and consequences of purely intestine war seem more brought home to us in this controversy than in the Spanish-American instance, or in the history of our own revolution, yet we shall find that,

after all, so far as those traits and features are concerned that are to affect our estimate of the character of the conflict—the fact of the confederated form of our government, the distribution of powers in the general and among the State governments, giving to the effort and front of war, without its legality of political tie and alliance, nevertheless, the form of organized communities struggling as if an existing or nascent state against the parent government—all this, if the Court please, should satisfy us that the situation, full as it is of public and of private griefs, for the first time to us, is, however, a situation not novel or unfurnished with guidance in the history of the world. We may know and feel that the instruction in the law of war which this nation has gained through those experiences are to serve for its rules now; for we know: "*Nec erit alia lex Romae alia Athenis, alia nunc, alia posthac, sed ad omnes gentes, et omni tempore, una lex; et sempiterna et immutabilis continebit.*"

The law which we are to administer is not different from that which is to be administered in the courts of London and in the courts of Paris. It is not other than was administered at the period of our own revolution, or during the struggle of the Spanish-American states. But, furnishing its pure, its everlasting and unchangeable rules, we are to bring the facts of our situation for its entire and perfect judgment.

Now, if this public and universal law of nations is to be the guide of the determinations of this Court, is there anything in the fact that this Court sits under a constitutional government and derives its power and authority through a constitutional government, ruled over by the organic law, that makes its administration other and different, more limited or more confined, than the simplicity of the law of nations dictates in all such situations? Why, certainly not. This Court sits here, in its full Bench precisely in the same jurisdiction as the Prize Court.

The Prize Court derives its authority from the federal

Constitution, by, for which, and to whose use, it is imparted. That authority is imparted that it may sit as a court, created and exercising the municipal law of the country that created it, and existing for the exposition and administration of the public law, the law of nations; and when this principle has been furnished by our constitution and our laws for the jurisprudence and judicature of the Prize Court, that is all that is furnished it. It has introduced it to the law that is to govern it, as is well expressed, in a somewhat similar situation of laws, in the administration of the judicature of a court, by the celebrated Sir Wm. Scott, sitting in the Consistory Court, in the great case of *Dalrymple and Dalrymple*, which was to test the authenticity of a Scotch marriage:

“As the case is considered in an English court, it must be determined by the principles of English law, that are applicable to such a case. But the only principle of English law furnished for the case is that the validity of the marriage rites in the case must be determined according to the principles—if the rites existed at all—of that country where the marriage had its origin. Having furnished this principle, the law of England retires from the discussion and leaves to the exclusive judgment of the law of Scotland the decision of the case.”

Now, if the Court please, before asking attention to the particular considerations which may be necessary before the determining of the case in argument as in decision, it behooves us first to look at the situation, at the absolute, incontrovertible, predominating facts which introduce this subject of discussion. My learned friend, Mr. Lord, with much weight and solemnity, has referred to the difficulty, to the impossibility, of changing a past fact or a past state of facts. He has even ventured to say, reverentially, that omnipotent power could not find that within its scope. Let me ask my learned friend and the judgment of your Honors, whether there is not the same difficulty in changing existing facts or, by theories or contrivances of law, obliterating,

obscuring, or defeating them. Is not a present fact, is not a present state of facts, as stubborn, as uncontrollable by the will of law-makers and of law-givers, as a past state of facts?

Now the situation so very well opened to your Honors by the various counsel on the one side or on the other who have addressed you, comes substantially to this. The government of the United States by its constitution and its laws, having rightful authority over the whole territory of the Union and over all its population, finds itself, at the middle of April, 1861, confronted by this situation of affairs: Political discontents, civil dissension, civil revolts, civil treasons, had occupied and controlled a territory which had for its division a line across the land from the mouth of the Chesapeake to the waters of the Missouri River; and this partition or division, held under not the least authority or pretence of authority of legislation, as proceeding from or consistent with the maintenance of the government of the United States, was protected and defended by the power of the population which inhabited it. For its other boundaries it had the wide reach of the sea coast, from the same point of departure, the mouth of the Chesapeake to the mouth of the Rio Grande, taking in the Atlantic and Gulf coasts.

This revolt, so far accomplished as, in fact, to have excluded all the peaceful authority of the government of the United States, there was no Court, no Judge, no marshall, no prosecuting officers, no jury grand or petit, that could exercise in any form or to any degree, the peaceful authority of the government of the United States within that entire region. There was no secondary reinforcement by the means of civil and peaceful authority, that in any part of that territory or for any part of that people could be brought to support the peaceful authority of the government. There was no power of any county, no power of any district that maintained the authority of the United States government or would have obeyed the call of its civil magistracy.

Now, without giving, at present, the least attention or effect to the political, the legislative, the magisterial proceedings of that population, or on this theatre, that had been adopted, and were in prosecution, we look at it as a simple fact, stubborn, irresistible, uncontrollable, that this was so.

But this community, thus extensive in its occupation of territory, thus numerous in its population, was also a community, like that of the rest of this favored nation, advanced in all the proficiencies of civilization and closely connected in the most powerful relations of international communication by the paths of peaceful commerce. It held within its possession immense staples, the object of desire of all the world, for which commerce, now as heretofore, was ready to venture all and more than all its peaceful risks. It was in the condition, from the very shape and form in which its peaceful commerce was developed, of needing from all the rest of the world, in exchange for those great staples, what went to supply the demands of a peaceful people, and, still more emphatically, of a power which was to undertake and to prosecute a war.

Now, in that condition, if the Court please, the Government of the United States could not find support in theory, in legislation, or in peace. It was no defect of our laws, either in their vigor, or in their scope, or in their multitude, that our authority was not maintained in this region and over this people. It was not that the magistracy, from the President down to the marshalls was not as vigorous, as useful and as powerful as peaceful magistracy can be or ever was. It was not that against resistance, tumult, and disturbance that fell within the range of riot or emeute, this government was not powerful enough in its civil magistracy or in the power of the loyal people who were ever ready to attend its call. But the whole fact was this—that peace was suppressed, magistracy excluded, authority derided and trampled under foot, and by mere power of war.

Now the Government was to meet this situation. How was it to meet it? There was no defect in its legislation. There was no defect in the distribution of executive power and authority—not the least. There was no difficulty, no failure, no inadequacy, if it could be dealt with by municipal law and through the municipal power. But the difficulty is that although, as our learned friend, Mr. Edwards, said, domestic trouble is under municipal law, in theory, yet when, in fact, it rises above municipal law, the statute book will not execute itself, and there is nothing else to execute it in the power of a government in its peaceful administration.

The Government must surely then meet this situation. It could despair, fold its hands, betray its trust, and surrender the dignity, the power, the fame, the inheritance and the hopes of this people, to a rebellion that is thus successful. Whether the Government should do that rests in the breasts of the people, in their primary capacity or in the representative *majestatis*, the Congress, to which they have entrusted the national power. But if you pass this point, that the rebellion is not yielded to, the Government not overthrown, then I submit that I go into no loose generalities, hang on no uncertain theories, rest on no legal vagaries, when I say that the Government is to be guided and controlled in what it does, by the facts that are before it. For if our learned friends or any of those who are to sit in judgment on the legal rights and powers of the Government in this situation, had been called into its responsible counsels, when the moment of action had come, and the moment of useful action was fast passing away, I take it that, if they had resolved to meet the rebellion and to suppress it by the power of the Government, there could be no more simple and unanswerable proposition than that they should meet it with appropriate means—not by means that might have been, or that had been appropriate to other situations in the affairs of this world, or to other situations in the history of

our own Government, but by means that were appropriate to the actual front and power, and threat of force in war, that were moved against the Government, and having, by that necessary reason, adopted appropriate means, it seems but the next step in the plain sense of the transaction. For as well settle at once into the despairing surrender of the power of the Government, as to find ourselves limited by the Constitution, by any law of human conduct or by any pretence of constraint, to means that were inappropriate and inadequate. Who will advise to apply inappropriate and inadequate means? Who will advise that there is any other instruction or control as to what is suitable and appropriate, what is adequate and effectual, except a wise and prudent and dispassionate—I agree—estimate, but still an estimate, of the mien and port, the proportions and dimensions, the efforts and the plans, the resources, the alliances, the connection, the revenues, the supplies, which this rebellion counts among its appropriate and its adequate means to overthrow the Government?

Our learned friends have made a strange reversal of a maxim as universal as human nature, and as permanent as the world's history or future—"necessity knows no law." But I hold that law, constitutional law, the law of a free people, knows no stress and no necessity. This is an agreeable, as, fortunately for us, hitherto it has been a practically true view of the situation of our affairs. But if, when the stress and necessity come upon us, our freedom from those constraints has enervated, not the physical power of the people and its resources for war, but has absolutely enervated and overthrown the primary counsels and wisdom, out of which alone safety can grow to the republic, then indeed have we fallen a final victim to that imputed vice of free republics, which separates debate from action, resolve from execution, wisdom from power.

Now, he who shall overlook, in dealing with this rebellion,

the facts concerning its line of coast, its foreign commerce, its great prizes to external commerce seeking its ports, its great needs, its great needs for internal commerce to supply its war, would, in the judgment of all wise forecast, and in the retrospect of history, be condemned as one who overlooked the first and most appropriate means and object for the application of the national power, and that which promised the most of adequacy and effect.

But it does arise in a different form, in respect to a different subject, and on a diverse exercise of the power of war—maritime capture, either in the sense of enemy property, as subject to it, or for breach of blockade, or cargo of contraband goods.

Now, your Honors will perceive that in all the cases that I have proposed on which the question might arise in the operations of our forces on land, the complainant either in criminal or in civil courts, must have been a loyal citizen of the United States defying in every way the power and entreaties of the persuaders to rebellion, and must therefore be within all the principles of the parental obligation of the Government to him and of the protection of the existing legislation of the country, and of its administration of justice in the courts, that have been invoked for these claimants in these prize cases. And then your Honors would have had occasion to calculate how any court of common law or equity jurisprudence should have interfered with or obstructed the direct application of the power of the Government in the form of war. But it is presented, as I have said, in the form of prize judicature, and it is said that there is wanting that necessary support and element of municipal legislation and of authority, yea even in the law of nations, to bring maritime capture and prize of war, moved against the property, in trade, of loyal citizens within the region of rebellion, under sentence and condemnation in a prize court.

What are the general propositions on this subject needing



to be contended for on one side or the other, and which, with greater or less directness, have been presented to your Honors? On the part of the Government it seems to me that the correct statement may be very briefly this: That when insurrection or rebellion has escaped the control of all the means open to the peaceful administration of Government, then Government may apply all the means of warlike force for the reduction of the power of rebellion, against persons, against territory, and against trade, which it may find appropriate and adequate to the end in view, and which under the law of nations governing all contests of force which come to the magnitude, and use the methods, of war, are allowable in public war.

Now, that the law of nations does govern all contests of force that come to the magnitude and use the methods of war, has not been controverted on any settled authority of a publicist or well-adjudicated case in the courts of the civilized nations. The question is, of peace or war. The whole division of the subject of public jurisprudence among nations is between these two conditions—that public law recognizing no other. I refer to Grotius, *De Jure Belli et Pacis*. Sir James Mackintosh says that “the province of the law of nations is to modify the intercourse between commonwealths in time of peace and to limit their hostilities in war. It has no other function in respect of hostilities, but to limit, to assuage, to rob them of their offences of cruelty and military force. But it does not detract, or attempt to detract, one atom from the weight and momentum of their efficacy.” This being, then, the general proposition of the right of a nation to apply its means and resources, appropriately and adequately, against persons, against territory and against trade, the next general proposition is, that the prize judicature has in it no quality of mulct or penalty, or of punitive or retributive justice, but attends the forcible capture wholly on motives and for purposes of confining such

forcible captures pursued on the high seas to the recognized and allowed obligations of such forcible captures and of protecting all other property and interests therefrom. We claim that the right of force against the enemy's trade is as much within the competency of a government, exercising power to suppress a rebellion, as its application direct against persons, or by overrunning territory. And we claim that it is a pure misconception to attribute to the prize jurisdiction that quality of fine, of penalty, of punishment, and of retribution, which enters into judgment on the conduct of the adverse party in a war.

If these two propositions be sound, it will be found that all that is urged against this authority of the Government against trade, and this particular form of enforcing its authority in the trammels of the laws of nations, fail entirely in their application and in their effect.

Now, the propositions on the other side, as presented and urged with such various form and with so much effect by the learned counsel who spoke last on the part of the claimants in this case, my friend Mr. Lord, are, I think, to be properly presented thus. And that is why argument will be found to turn upon, and constantly recur to, one or the other of these ideas, for its entire support. He claims that the situation discloses a treasonous war against the Government, which is a personal war, and not a territorial war; that the Government proceeds only against personal delinquents and not on any attribution of hostility to residence or incorporation in any community or region drawn into hostilities. And, secondly, that this special character of war, whatever direct application of force and weight of adverse war on the part of the Government it may support, draws to itself none of the judicial inquisitions and sentences which come in as the law of full war. And he attributes to the prize jurisdiction and to the prize sentence, that quality of inquisition into, and punishment for fault or guilt.

The propositions of our learned friends from Boston who maintain the case of the claimants, as drawn from the oral arguments and from the printed brief, are, it seems to me, fairly stated thus: I quote now from the brief itself:

“Undoubtedly the Government has belligerent rights against its rebellious subjects, but they are confined to its subjects actually in rebellion and cannot be exacted by confiscation so as to create forfeiture of the goods of inhabitants merely of territory held by rebels, without some positive legal enactment. 2d. Judgment in a Court of Prize must follow and rest upon acts and declarations of the Executive, which themselves must be passed upon and supported by Acts of Congress, or directly upon Acts of Congress, as the support of the Judgment of the Court.”

Then it is claimed that the action of the Executive under laws for the suppression of the rebellion does not create the status of war followed by the secondary or legal consequences,—as it is called throughout the controversy—of the prize jurisdiction.

Then, that the acts of Congress subsequently passed are to be construed as declaratory of the original relations of persons and property to the Government—in which we, of course, cordially agree. And they insist that they show—that is, these later acts of Congress—not the result of confiscation for residence, but the contrary—that the visitation of law is wholly on those in rebellion actively and who are guilty of treason.

“5th. That these subsequent Acts of Congress give construction to the proclamations and show the exact status to be, that loyal citizens, retaining their residence within the region of rebellion, are not *enémies* but citizens, entitled to protection and not to confiscation.”

And they then allege as a general conclusion, and on adjudications and text writers that, “no case can be shown in a civil war where confiscation has been made from mere residence, but from some special decree of Government.”

Now, if the Court please, however novel and interesting these primary considerations of this situation and its consequences between a Government and rebellious subjects may have been when the first prize court was opened and when the exercise of this belligerent authority of the Government of the United States made its first captures, it seems to us that, in resolving what the laws of nations are and what the rights of Governments thrown into this predicament are, under the public law of the world and toward the nations of the earth, there is some aid to the argument to be found in the fact that, inspecting the question under the strongest interest that can ever influence foreign nations not to treat this as a war or allow it to be treated as a war, every maritime power, every great nation, every civilized community, that is drawn within the folds of commercial or friendly intercourse with this country, has pronounced it a war on the first intelligent examination of it and has surrendered all its rights, all the rights of its subjects, bowing to the overwhelming fact of war and its irresistible, indisputable law-making power.

Now, supposing it stood here; supposing it stood merely on the public history of these transactions, as it is to be collected from the political action of the civilized, commercial, maritime nations of the world, supposing that in the final winding up of these transactions, either by the re-establishment of the authority of the Government and the suppression of the rebellion, or in any measure or degree of its—the rebellion's—success, the history is closed, and is to form an example for the future, as an exemplar authority in international law—who shall say that it is not a decree pronounced on the clearest evidence of fact, and the most solemn and authoritative judgment, that this is war, and gives international rights of war toward neutrals, and gives authority of war between the opposing forces that contend on the one side and the other in the struggle of civilized communities, whose forces

are the whole strength and resources of the respective populations, the whole energy and power of their respective international, commercial relations?

What, if the Court please, is this system of the law of nations that adapts itself to, and controls such situations? It is "the voluntary law of nations." Such is the phrase of the books. Such is the nature of the authority—for there is no power compelling the assent or action of nations. It is the voluntary law of nations. It is under the voluntary law of nations that we claim to exercise the right, and that neutrals should submit to it. It is under that great law of nations that, if at all, they do submit to it. And if their present voluntary conduct be not a confirmation and support of those principles, as aforesaid existing and forming a part of the law of nations, and if this stood as a new and original consent, it would introduce and establish a part of the voluntary law of nations, that could not fail to be respected in the future.

So, too, when we come with great respect to the authority of this Court, we seem to find some support to the argument, that may turn the balance and burden on the claimants here, in the fact that every prize court in the nation has found in the law of nations, has found in the situation of facts which introduced the controlling authority of the law of nations, the necessary, the invincible requirement to sustain the prize judicature as within the competency of the Government. Their learned opinions, pronounced independently, reasoned on their own vigor, and supported by as comprehensive research as is needed for the elucidation of the subject, are, or will be, all before your Honors.

In the third proposition, which I have not seen successfully contested, that no authority of prize law, no authority among accredited writers on the law of nations, has ever pretended to say that a situation, arising between the two parts of a nation, whether it divided it into mere factions, or

whether the parental government maintained its authority and fought against traitors, cannot, if the facts brought it to that head and necessity, not only support, but compel, the introduction of the laws of war in all their force and authority, I mean to say that the enlightened, advanced, humane, principles of the law of nations will not permit war to exist in that brute and violent force, without the importation of the moderating, controlling, restrictive, assuaging, influences of the laws of war. Even those foreign authorities that have been introduced, and in part transcribed on the briefs of our learned adversaries—the most favorable to them that their researches could furnish, and quite remote from the usual sources of international law to which we are accustomed to apply in our courts or in the courts of England—contain no limitation that will not introduce, when the facts pronounce themselves sufficiently, the absolute and complete authority of the law of nations. Thus, in the extract from the civil law, most relied upon in the brief in the Boston case, *de captivis*, it is said, “In civil dissensions, although often, by that means, the commonwealth is exposed to injury, nevertheless the contest does not touch the safety, or threaten the destruction, of the republic”; and, in such cases, the rule is asserted that the change from freedom into slavery is not accomplished by seizures in such a war. Without discussing or presenting what is apparent to observation, the entire difference that exists on this matter of personal freedom, from the consequences of destruction of the power and strength of the enemy by the direct application of war to its trade, it will be apparent that the whole limitation there rests on the fact that the civil dissension is within the limit of effecting injury—as by the existence of strife every community is injured—but has in it no threat of destruction to the public constitution—the commonwealth itself. So, too, Hefter, quoted here, says,

“The state of war legally exists between such parties only

as are entitled to exercise the extreme rights of self-defence, and therefore it can only take place between parties entirely free and independent of each other, and who are not subject to a superior jurisdiction common to both. Such is a war between sovereign states, or against individuals belonging to no state—such, for instance, as freebooters, filibusters, pirates and the like. An internal war between political factions can, at best, claim legality as a matter of necessity; and it can never give rise to a regular state of war such as may exist between states foreign to each other.”

Now, this writer, theorizing on the possible situations in human affairs, necessarily concedes that legality of war must come in by necessity, as soon as the necessity arises. We agree that the legality of war comes in upon a necessity, which absolutely overthrows the peaceful authority of the Government, closes its courts, and banishes peace; and then, as I have attempted once to show, there is but one of two choices open to the state—one to yield its life to the attack made upon it, one to defend itself by such power and resources as it possesses.

So your Honors will find that these remote theories of these writers do not attempt the absurdity of saying that they will control, or that any written authority of law has controlled, or can control, the submission of all things human to a necessity which overpowers.

Now, the topics in their due subordination which seem to need discussion, I humbly suggest to the Court are these:

1st. Of the powers of the Government in the suppression of rebellion.

2nd. Of the department of the Government in which these powers are lodged.

3rd. Of the measure and sense in which these powers have been exercised.

4th. The mode and form, in their legal nature and effect, in which the property now in judgment became involved in their grasp.

And then the lawfulness of the captures and the validity of the sentence in prize.

This brings me, if the Court please, to the consideration of the first proposition in my printed brief, page 22.

“The situation in which these vessels and cargoes are found, as presented to the Court is, that they were seized at the dates of the 17th and 20th of May, about the 20th of June, and 10th of July, in all cases by public armed vessels of the United States Government, brought into port, delivered to the prize Judges, libelled in prize by the District Attorneys, condemnation demanded in the name of the Government as prize of war, adjudication had, sentence passed; and from the sentence of condemnation, the appeal has been taken.”

Now, I relieve at once this argument from what has formed so large a part of the effort, with zeal and great ability pressed, of our learned opponents, to argue that this Government cannot, in the situation disclosed, by its executive power, either legislate into existence crimes, and apply to them penalties and confiscations, or try a case of personal fault and delinquency—that it cannot subject to attainder, and, by consequence, that it cannot overthrow the rights of property by a blow, and that these sentences and these procedures cannot be defended on any such principle or support. For we agree that there is not the least quality of municipal or statutory offence in the conduct of these vessels or of their cargoes, nor of municipal or statutory forfeiture in the procedure for their condemnation.

We do not oblige our learned friends to argue that such things cannot be done, for we admit that they have not been done and have not been attempted in these procedures. Whether indictment, trial, conviction and sentence, with this or that result of personal punishment or fine, can be based on anything, on any new relations that have arisen in consequence of the war, wherever it may be debatable,



is not debatable here; for the Government has taken no such proceeding, and asserts no such right in these causes. Nor have their condemnations proceeded at all as an incident or as a consequence of any inquisition into the personal guilt of any of the owners of the condemned property, as being traitors or rebels, or aiders or abettors of treason or rebellion. We say openly and distinctly that, as an administration or execution of law under the peaceful authority of the Government, the whole transaction, from capture to sentence, is without any support. It is only in and from a state of war, having its own laws, tribunals, processes and sanctions, that the offence, the arrest, the Court, the trial, and the sentence, have their origin and legal validity. And if the status fails, the captures were, undoubtedly, open and violent piratical aggressions on peaceful commerce, the prize jurisdiction is imaginary, and the sentence ineffectual to pass property in the vessel which may be sold under it.

And now, if the Court please, having cleared ourselves of the least necessity of maintaining or defending those powers of confiscation and of punishment by mere authority of the President, or of attaining statutes or procedures that would justify them, I proceed to submit to your Honors what I suppose to be the whole subject of jurisdiction and determination in a prize court. I say that, as a matter of its own jurisprudence, and its own determination, there is but one question before a prize court—and that is, prize or no prize—that the existence of the jurisdiction, the openness of the Court, rests on the postulate that there is war. Now, whether there be war or not is, I agree, a question to be determined on principles furnished by the law of nations under which the prize court sits.

The mere fact that a vessel is brought into port and a libel filed by the District Attorney does not oblige the prize court to open itself to the hearing and administer the law of prize

or no prize. But although the determination whether the preliminary postulate of war exists to raise the prize jurisdiction, is solely and wholly by the recourse of the prize court to the action and voice of the political powers of the Government under which it sits, it never was heard of that a prize court can erect itself into a jurisdiction to recapture a vessel that its sovereign had seized in the right of war. Never,—but to learn, under the Commission with which the sovereign had entrusted it, whether it was such a capture as the sovereign intended to make. It never was allowed to say that there was no war, when the sovereign said that there was. It never was allowed to say that a seizure was not made in the intent and under the assumed authority of being by the law of war, when the sovereign said that it was. The moment that any such pretence or assertion of authority is submitted to, it is made not a court under the Government, but a court over the Government. It is determining whether a war exists which the sovereign has declared to exist, and is determining whether the sovereign, in a capture unmistakably forcible, shall hold his prize, or whether the court shall recapture it, and deliver it to the hostile or adverse party.

Now, if the Court please, this proposition does not in the least interfere with what we recognize as the familiar and necessary jurisdiction of the prize court. The object of the prize court is not to give to the sovereign a right to capture. The sovereign asserts his right to capture. How does he declare his right to capture? If he has declared a war, or if he is engaged in a war, he asserts his right to capture all property that, according to the laws of war, is affected with the quality of enemy property, by its being really in the ownership of the hostile party, or by such conduct, breach of blockade, or cargo contraband, as exposes neutral property to the same consequences which hang over enemy property.

When, therefore, the sovereign brings in his prize, it is a concession to that principle of the law of nations, demanded, to be sure, and insisted upon by neutral nations as the condition of their assent to the exercise of belligerent rights at all, on the open sea, and on indiscriminate commerce,—that the sovereign is to bring in the property captured and not destroy it. It is that it shall be brought in and submitted to judicial investigation whether it, the very *res* before the court, comes within the right of the Government prosecuting the war under the laws of war. The sovereign cannot seize friends' property. All neutral property must submit to search, visitation, and to arrest. It cannot resist arrest. But when the inquisition is open, then the inquiry is, does this very thing, the *res* before the court, fall within the predicament whereby the sovereign of the court, prosecuting the law of war, may rightfully seize, under the law of nations. But, supposing that the sovereign has asserted a principle of capture under the law of nations, and has put it in execution, what is the duty and what the situation of the prize court? Why, manifestly, the duty of the prize court is to say and to see, "the sovereign has assumed the responsibility of this principle of maritime capture as being within the authority of the law of nations, and which he insists upon. His prize court has no commission to thwart that purpose or overrule that confiscation. The sovereign, if in fact he has departed from, gone beyond, the rights of the law of nations, is responsible in his political capacity to the states whose subjects have suffered injury for those offences." But if you will introduce into the jurisdiction of a prize court this faculty of setting free what the sovereign has announced, as his purpose and his construction of right under the law of nations, to seize, you at once turn this jurisdiction from its pure and simple function—of examining into the circumstances of the seizure, to see whether it is within the asserted right of the sovereign—into a power over the sovereign, into

an ally of the enemy, into an aid against the public and united authority of the nation.

Now, if the Court please, when we have sought in our judicature on this question, as applicable to the situation in which the controversy was between foreign parties and we were a neutral, it is familiar lore that the question of war or no war, as the preliminary postulate to the question of prize or no prize, was referred by our courts to our own Government in its political capacity. The political power of this Government, when it settles political questions, settles them under responsibility, settles them under reasons of state, settles them under reasons of public policy, influenced by a thousand considerations which never can come before a court of justice; and the courts of the nation have never spoken a different voice from their Government on the question of war or no war, whether they are applying this judgment to a situation, as in the Spanish-American cases, where the conflict is between parts of another nation, or to a public war, or to a private war, or to a civil war. A seizure made by a Government may be brought into a court of prize and yet the prize court reject the jurisdiction. What does it look at? Is the seizure made by the authority of the Government? Yes. Is it made *jure belli*? If it is made *jure belli* by the sovereign, then we examine to see whether he has a right, under the law of nations, as the court interprets it, or whether he has asserted a right on his own construction of the law of nations, to make the capture. But if the sovereign has not made it *jure belli*, although he has made it in fact, if he has made it as a part of a system of peace embargo, of arrest as matter of precaution, and preliminary, then it is not an arrest *jure belli*, and as the prize court has not the least jurisdiction over anything not done *jure belli*, it remits it to its jurisdiction and leaves it under the civil constraint to which it was decided to belong.

Such are the decisions in the cases to which I have re-

ferred, but most distinctly and emphatically when an arrest is made at the outset, or in advance of open and publicly declared, or fully established hostilities that come up to the state of war. When this arrest was made, the undetermined and unsettled state of things would have made it unsuitable, premature, to declare such an arrest as being *jure belli*; for the fact of the political recognition by the Government of war, would not have been made apparent. The arrest, however, is made. And subsequently those sparks of collision have lit up, between the two powers, the flames of war. Then this previous arrest is made the basis of a libel as prize of war. And then the court, looking back through the light of subsequently developed facts which produce an open war, says that the arrest was *jure belli*, in that preliminary assertion, not of municipal right, not of peace embargo, but as of the outset and initiation of war; and then the condemnation proceeds as prize of war, *jure belli*, applying the political construction and conduct of the Government, afterwards appearing efficacious, to the facts as in the time of the seizure.

Now, what is the first argument and what the first test on which a prize court would be asked to say that a seizure, brought in for its adjudication, was not, in intent and in truth, a capture *jure belli*? If it was brought in by a public armed ship of the United States from the open seas, it would, on the face of it, seem to be an act of war, and not a municipal or peaceful arrest—not to have anything of exchequer in it, or confiscation, but prize of war. If, in addition to that, no advocate, no argument, could present an alternative power, of peace and of municipal authority, under which the arrest could, by possibility, have been made, the court would say that that arrest—there being no possible support, no possible authority of municipal jurisdiction under any existing law, or municipal procedure under any existing law whereby the arrest had been made—if it were proved to have been

made by the sovereign authority, and was not a marine tort, not a private injury, not a marauder's spoliation, must have been made by the sovereign, *jure belli*. I submit, then, to your Honors that the prize jurisdiction, in its original sentence and at this stage, is limited to the inquiry whether it be prize or no prize under the rules of war on a capture *jure belli*. And on the question whether the capture was made by the United States of America, *jure belli*, you are only to look to see whether the political authorities of the Government made it peacefully or *jure belli*. If peacefully, your jurisdiction is gone, and you surrender it to the peaceful jurisdiction of whatever court may have jurisdiction of it. But if you find that the United States of America asserted the *jus belli* and, in the execution of it, made these captures, you never can overthrow the political authority of the Government, and surrender to the enemy what your Government has chosen to seize.

If, then, the prize court is right in its determination below that the capture was made *jure belli*, was it lawfully made *jure belli* is the question of prize or no prize. And that brings me, if your Honors please, to the consideration of one of the particular circumstances in the Crenshaw's case. This will be found stated at page 13, and the subsequent parts of my brief.

Now, what are the principles and usages of the law of nations applicable to a state of war and to the assertion of *jus belli* which subject to sentence vessels brought in as prize? Halleck, in his book, page 472, referred to on my points, has very succinctly and very truly stated the existing and established law of nations to be that when two powers are at war, they have a right to make prize of the ships, goods and effects of each other on the high seas, and that that right of capture includes not only Government property but also the private property of all citizens and subjects of the belligerent powers. That is the asserted

right, the *jus belli*. If I am right, then we have only to consider, in the argument, whether this property comes within that predicament. Now, there are various claimants here, and there are special circumstances distinguishing the predicament of the particular items of property for which they press their claims. My learned friend, Mr. Lord, has stated what is presented in my second point, that the tobacco shipped by I. and I. H. Caskie presents no question of difficulty within the scope of the general inquiry of prize or no prize. It is the property of Richmond merchants, established in trade there, and constituting a part of the people, and their trade a part of the trade, of the hostile region of the rebellion. If the law of prize is applicable, if the *jus belli* has been asserted by our Government and the capture made, your Honors will find no difficulty in confirming this capture by the law of nations, in the sense that it was what the sovereignty intended to capture. In regard to the invoice of Richard Irvin & Co., there are two views that may be taken of it—first, whether this invoice was wholly the property of Richmond merchants, or whether it was held in moiety, in part ownership or partnership, by the Richmond merchants and by Richard Irvin & Co., the New York merchants. The statement is wholly contained in the answer, which is supposed to be separated as a test question of property, and presents a case somewhat of this kind: Richard Irvin & Co. having this firm of Clarke & Co., resident merchants of Richmond as joint adventurers with them in a business consisting of the purchase of tobacco in Richmond, and its consignment to Liverpool, to a house there representing Richard Irvin & Co., or being their correspondents for sale, were in the habit of supplying money by which the purchases were effected in Richmond, and having the property consigned to their correspondents—the results of the sales, the proceeds of the adventures being equally divided in matter of profit between the Richmond and New

York firms—Irvin & Co. of course receiving back the amount of their advances, and that which stood for profit being equally shared. It does not appear at all, in any affirmative and definite form, as I respectfully submit (my learned friends will correct me if I am in error) that the matter of reclamation, in case of loss, was otherwise than the ordinary commercial relations of such transactions—to wit, that Irvin & Co., in case the proceeds of the tobacco failed to reimburse their advances, would have their reclamation against the Richmond purchasers who had been supplied with their funds. If that were so, then, in the contemplation of a prize court, this tobacco was the property of the Richmond merchants, and Irvin & Co. were mere advancers having the lien of consignees on the property.

But, if the other view be taken, that they were joint owners of the property—for there is nothing, it seems to me, to indicate any deposition of exclusive ownership on the part of Richard Irvin & Co.,—then the shares would be determinable in this way: The shares of the Richmond merchants would present the clean case of enemy property, following the fate of Caskie, and the shares of Richard Irvin & Co. would fall within the predicament of property of our own citizens, loyal and resident in a loyal part of the country, but found implicated in the trade of the enemy, and, as we say, good prize, by the law of prize, as being thus implicated. And the condemnation proceeded on those grounds.

Now, my learned friend, in his argument, laid down a proposition that a distinction was to be taken in condemnation of property of our own citizens involved in trade with a recognized enemy, whether the property had been purchased by our citizens before the war broke out or not. I ask your Honors to do me the favor to take a citation under the 3rd Point, on the 16th page of my brief. It is the case of the *St. Lawrence*, 1st Gallison, 470. "Property purchased before the war equally excluded from trade, and equally



open to condemnation as if it had been purchased afterwards."

These questions are, of course, important and interesting just so far as the amount of property involved and the rights of private parties are concerned; and under the authorities to which your Honors have been referred by my learned friends, and the references which I have made, it is but a question of the ordinary prize jurisprudence to determine whether the predicament in which the share or interest of Irvin & Co., if they had any share or interest, is found the subject of a condemnation.

There is another claim here, which is represented by our friend Mr. Edwards—the case of Ludlam & Watson, who had some interest, joined with Lear & Son in that parcel or invoice on board ship. Lear & Son's interest, whatever it was, was acquitted, but they have appealed because it was acquitted with a charge of costs upon them if they did not make further proof. That is to say, they were allowed to make further proof. If they accepted that favor of the Court and made their case clear, the adjudication would have been with costs or without costs, according to the merits of the controversy thus made clear. The Court said, "I do not acquit you on the evidence. If you make it plain that you are entitled to restitution, why, of course, the costs go, but if you rest here without undertaking to make it plainer, I say that costs shall be charged against you because of the obscurity and uncertain situation of the property." Now, that was in the discretion of the prize court, and so far as Lear & Son are concerned, the appeal is only on that question of costs. They did not take the alternative of making their case clear by further proof, and they appeal from the sentence on that question of costs. I submit that this appeal cannot be sustained.

Ludlam & Watson have an interest in the same invoice of tobacco, which is of very moderate amount; and their re-

lations are of this kind: Ludlam & Watson were a Richmond firm of merchants. Watson was a citizen of Virginia and a resident there, in the rebellious region. Ludlam, the partner of the commercial house domiciliated at Richmond was a resident of Rhode Island, thus living in a loyal State. The shares of partners being, on the later decisions, to be discriminated on a question of condemnation, Ludlam & Watson stand, for aught I see, in regard to this parcel, in the same relative position as Irvin & Co. and Clarke & Co. do to the present parcel in which they are interested, provided they are joint adventurers, and the whole property is not in Clarke & Co.

I believe, if the Court please, that this is all I need to say specially on the circumstances of this case.

If I be correct in the limit of the duty, the jurisdiction, and the jurisprudence of the prize court; the considerations, other than those that I have stated, would be limited to an inquiry as to whether the political authorities of this Government had indicated in such a manner as that the prize court must obey those indications, that this was not a municipal seizure but was an assertion of the *jus belli*. As, however, the assent of the Court to that proposition is not to be assumed, I am obliged to consider the more general propositions that this Government, under the law of nations, and in the situation in which it was placed, had a right to have recourse to the *jus belli*, as well as that it did, in fact, have such recourse. And as the separate treatment of these two questions—whether the Government did, in fact, have such recourse, and whether it had a right to have such recourse—requires an attention, in great part, to the same public facts and the same public documents and laws I shall not attempt to separate them otherwise than in this statement.

Now I have stated, sufficiently for all the purposes of my second proposition, the situation of this rebellion toward the Government of the United States. The Civil War had al-

ready carried into complete revolt whole states, had organized the form of a separate and independent government which was conducting open military hostilities, with all the outward circumstances of public war. I shall not need, in my argument, to rely at all on the civil, political, governmental transactions of the rebellious population in the rebellious region, in any other sense or for any other purpose than to show the dimensions, the proportions, the connections of the war-making power against the United States. To the argument of our learned friends that there is not the least touch or quality of legality under the Constitution of the United States in what they have done, we, of course, accede as, on the primary reason of all things, must appear. But they have a power that is engaged in war, and besides its array in arms, it has the combination of policy and council; for, as Grotius says, "war has its *concilium* as well as its *praelium*." And this organization, whatever you call it, is of the whole people of the whole region, of all its connections *ad exteros*, of all its communications of civilized society within itself, making up—for the purposes of this argument as for the purpose of various of these citations—an aggregated power. Well, the national Government met this war with its whole military power, land and naval, to defend itself from overthrow, to preserve the integrity of its domain and to reduce their power of war.

Vattel says that "war is the state in which a nation prosecutes its right by force." The essential idea of war, not in any fancy or far-fetched analogy, but in the very nature of its destruction of peace and order, is common to nations and common to individuals. It is the predominance, while it lasts, of force and of nothing but force; and the only laws that are imported into it are the laws that regulate or limit its force. Now, Grotius says very distinctly on this question of war that "there are but two things to be considered by those who are about to treat of the rights or the laws of war.

First, it must be seen what the war is, which forms the subject of the inquiry; second, what the law or right to the *jus* of war is, which is the object of the inquiry. Cicero has said that war is a contest by force, *bellum decertandi per vim*; but the use has obtained that not the action of war, but the status, should be called by the name of war." So that war is the state of things continuing by force—*belli status per vim*. There is not a touch of law about it. It is a pure question of fact, when two independent authorities, who can be made so by the action of war or by the action of hostile force on one side and the other, have a status, and distinction from a simple battle, then they are considered in war.

"These generalities," Grotius proceeds, "include all kinds of war, concerning which hereafter we shall treat; nor indeed do I here exclude private war, as because in itself it is prior to public war, and without doubt has a common nature with public war, which on that account leads to the application of the same term of war to both."

He says again, in his third chapter, "The first and most necessary division of war is, that one war is private, another public and another mixed. Public war is that which is waged under the authority of one who has jurisdiction; private, that which is waged otherwise; mixed, that which on one side is public and on the other private."

This applies to the situation in which this country is found, the definitive description of mixed war, waged on one side by the party having supreme authority or sovereignty, and on the other side by private persons—for I do not attempt, as I certainly do not find it in the least necessary, to impute any other authority to this immense combination of rebel citizens of the United States than such as is produced by the tie of the common policy and common force as used in war.

Then, of the lawfulness of private war he treats on the ground that, by the law of nature, in self-defence it is certainly admissible. Now, let us see what public war is.

"Public war is of two kinds, that which is solemn under the law of nations, and that which is unsolemn, or less solemn. That war shall be solemn public war by the law of nations, two things are required; first, that it shall be waged on each side by public authorities which have the supreme power in the State, and, second, that all the rites and ceremonies of its declaration shall be present—of which we shall treat. These two things together are required to make a solemn public war, so that one without the other, is not sufficient." No solemn public war, within this definition of Grotius, could exist, however powerful and independent the respective belligerents were as sovereigns, if it had lacked the forms of ceremonious declaration. "But less solemn war" he continues, "or unsolemn war can exist, and be without these rites, and be waged against private persons, and have for its authority any magistrate."

So that the distinction which our learned friends have been so much disposed to insist upon, that public war, which brought the consequences and the secondary laws, as they call them, of war, cannot be attributed to the situation in which this nation is found, has certainly no support in the more authentic repositories of the rules and distinctions on this subject.

Grotius then in his 4th chapter says—and I ask your Honors' attention to it, as it forms a staple part of the argument of the rights of a nation in self-defence:

"Wars can be waged both by private persons against private persons, as by the traveller against the robber, and by those having the supreme authority against those who also have supreme authority, as by David against the King of the Ammonites, and by private persons against those who have the supreme authority, but not over them" (that is, by private persons not against the parent government, but by private persons against a foreign government), "as by Abraham against the King of Babylon and his neighbors,

and by those who have the supreme authority, against private persons, other than subjects, as by David against the adherents of Ish-bosheth; or not their subjects, as by the Romans against the pirates."

Now, we may talk about war as much as we please, and about what the conditions are, on which a war is perfect, imperfect, solemn or unsolemn, and about the distinction between war *inter gentes*, and war by the sovereign authority against rebellion, and war between private parties, and against pirates, there is one thing which is common to them all, there is one thing which makes a discrimination between war and peace—and that is, its force. And from the instance of the traveller against the robber, up to the mightiest powers that have divided the earth's surface between them, it is war as and when it is force, and in so far as it is force. But when the subject comes up to be dealt with in the law of nations and before its tribunals it must have, not the mere quality of force, but it must have the supersession of all peaceful authority and control, and must occupy, in its dimensions and proportions, in its means and methods, in its armaments and forces, the character of war, as distinguished from private strife. And there is no other distinction than that. You may find difficulty in drawing it, although, I think, in the world's affairs nothing has been certain if it has not been certain when there has been war and when there has been peace. Theoretically you must suggest differences, but there is no other rule of discrimination except the inspection of the facts themselves. When the peaceful authority of a government is overthrown there may be submission on the part of the public authority, or there may be a contest for its recovery, or a contest for the legitimacy of its overthrow. And that is the situation of our affairs, for the peaceful authority of this Government was overthrown in fact on every road of the rebel territory and in respect of every resident within it. The rebel contest,

therefore, was to legitimatize that overthrow and to obtain a sovereignty that had peaceful authority there. That would have brought peace. The contest on our part is to suppress the rebellion and restore the legitimate authority of the parent Government over the rebellious region, as to its territory, over the rebellious citizens, over all the citizens—for it is equally driven out from rebels and from loyal men—and that contest is not under municipal law, nor in the nature of things can it be. It is war, and nothing but war.

Now, this war, as I have said, was between the Government of the United States on the one side, and the people, whether communities united or dispersed, who were in the rebellious revolt, on the other side. Our learned friends say that it was not between the United States and any State Government, to which I agree. There is not any posture in which the State Government could be recognized (as a civil and political body under the Constitution of the United States) as at war with the United States. We are at war against the total power of war that is moved against us. But yet, owing to the divisions of the people into the States forming a part of the United States, apparently constituted as a part of its political arrangement, and of its political power, it has the form and appearance of a public war on the side of the rebellion as well as on our side.

This brings me, perhaps, to the distinction which I have indicated to your Honors, as lying at the bottom of the argument on the part of our learned brothers, between personal and territorial war. Now, treason is the crime of those who commit it. Unquestionably they are the enemies of the Government. They are subject, for their personal guilt, to the penalties of criminal law. Whenever our Government has authority, when its laws have their course and play, then the guilt of these persons is to be, at the will of the Government, a matter of judicial inquiry; and then, against them, as persons, no procedure of any kind can be had ex-

cept by the authority of the Constitution, according to its guarantees, in its constitutional tribunals, before judge and jury. We have no controversy on that point. I do not know any manner in which this Government has a right to proceed personally against individuals at the South in respect of crime, or for treason, or for treasonous war, except under the Constitution, by indictment, by trial before a jury, by conviction, by sentence, by execution. The number of those criminals makes no difference in our rights towards them, under the peaceful authority of the Government, under municipal law. But the trouble about the matter is that this very authority of law over traitors, and for the punishment of treason, is overthrown with all the other authority of the Government. If our law of treason had force and efficacy there, why, our other laws would have force and efficacy too.

If your Honors, in your respective circuits that fall within the geographic limits of the rebellion, could sit and try men for treason, it is likely you would be allowed to sit there and try causes between man and man. That is not the favorite exception which they would like to make in obeying the jurisdiction of the Federal Court. The moment you get to the possession of their persons and can punish them as criminals, that moment the war is over, and the tribunals have their place and their power. At the outbreak of a treasonous war, when it has agitated itself into the inflammation which, by our Constitution is necessary to make it treason—the levying of war against the Government of the United States,—you may, when it has reached that point, pursue it without war. To that I agree. You may send your marshal and enough deputies to capture the whole war. That is, constitutionally, sufficient to involve men in treason. You may call upon all the power of the district, if necessary, and it may amount to a hundred thousand men. That may be sufficient to suppress the treason, and seize the traitors.



The court can be, all the while, sitting; and all can be done with a marshal and *posse comitatus*. That is all very intelligible. But, supposing that the traitors and the traitorous war will not preserve that straitened and feeble condition in which municipal law and the peaceful administration of Government has its exercise over them—suppose they change it from a personal war into a popular war or the war of all the people that inhabit the State, or into a territorial war or the war of the entire region which constitutes the country in which they live, are we to be told that, they having turned it into popular war of a people and into territorial war or the war of a territory, against us, we must preserve still the notion that it is a personal war on our part, and that we have no efficacious and legal penetration through the barriers of territorial defences in the pursuit of individual traitors, by the power of the Government? Where do my learned friends find a right on the part of the Government to escape from the bonds of municipal authority and municipal obedience on their part and to follow the personal treasonous enemies of the country by war? I do not know where it is to be found. I do find a power to suppress a rebellion. I find a power to use the army and navy, and the whole militia of the United States, that is, to use all the forces and powers of war that the country possesses. Is there anything left out? Is there anything which belongs to the war powers of the Government except its army, its navy, and its entire arms-bearing population? Certainly not. I find the power to use that to suppress the rebellion; but I do not find an injunction that it shall be used in a way that will not suppress it and cannot suppress it. I do not find any limitation. I do not find that, when you have got the army and the navy, and the entire arms-bearing population of the country, the Government is so trammelled that it can only proceed to hunt up traitors and bring them in for trial. I do not find that, when the war, in the name of rebellion,

urged against the Government, is of that extent that it is of a people, and of their territory, and of their trade, the Government cannot return the war on that people, on their territory and on their trade. I do not find that the function of war is, in the least, to catch and arrest traitors. It is to introduce peace through war. It is that the Constitution and the laws of the country may prevail again, and so traitors may personally be seized and punished. But the proposition that we are all, in time of war, executing the powers of peace,—while, if the powers of peace could be executed, there would not be either any justification or any existence of war—is confounding the necessary distinctions. War gives us no hope or promise, however it arises, except that it will restore peace. When it is waged, when it is master of the theatre on which it is played, peace and peaceful powers are wholly driven out; and only in the train of successful and triumphant war, or of unsuccessful and defeated and submissive war, does peace ever return. Peace, in and of its powers, of its faculties, of its duties, never will bear sway over any portion of this territory or this people that has raised itself in war against the Government, except so far as the power of our war shall have rescued territory and people from the power of their war, and restored them to the Constitution and the laws, and the jurisdiction and the protection of this country—or just so far as their war is successful, predominant, triumphant, subversive of our power and our Government, shall arise a new municipal authority which, in peace, shall execute new laws.

The charge of his Honor Judge Nelson has been referred to on the printed briefs, and, I think, also adverted to in the oral arguments, as being supposed to give some countenance to, or to sustain some inference favorable to, this distinction between personal and territorial war, which, as I have submitted to the Court, must be determined by the question of personal or territorial facts, I am unable to

find in the charge of his Honor, the Judge, to the Grand Jury in his circuit, anything that can support this view, in any application to the subjects of discussion in the Prize Court, and now before this tribunal. In the first place, your Honors see that the very attitude of the learned Judge, in addressing a charge to a Grand Jury which has inquisition of personal crimes, must almost necessarily—must most suitably and therefore necessarily—have been limited to considerations that had to do with personal guilt; and the aspect in which his Honor presented the subject to the jury had not the least connection with this matter of whether war can be waged against a people and against a territory that were incorporated in the adverse war, but was wholly as to the municipal legislation in force, and under which subjects could be brought before grand juries for indictment and trial for personal crimes. After presenting the subject of treason under two branches of the clause in the Constitution, that of levying war and of adhering to the enemy, his Honor presents this consideration—and at the very outset the Court will perceive that the learned Judge rejects, in the very phrase of his address, all these distinctions.

“The unhappy condition of our country arising out of the unnatural struggle of the people of a portion of the Union to overthrow their Government.”

Not a portion of the people of the Union, not of individual and personal hostilities to the Government, but “the unnatural struggle of the people of a portion of the Union to overthrow their Government.” Now, this at once recognizes and rests upon the fact that “the unhappy condition of our country,” no matter how it originated, in treasonous resistance and repugnance to the Government, has come to be a struggle of the people in their aggregate sense, of a territorial portion of the citizens of the United States, for the overthrow of their Government. It is not, in fact, of the least moment in the estimate, if hostilities arise, what the

original designs or what the actual motives were which have grouped together the combatants. Whenever an entire people, in their several means and measures of power, are wrought into a unit of hostility, and so thrust and wielded and urged against the Government, then the Government must oppose it, as a unit of hostility, so thrust, and wielded, and urged, or it falls into the folly of using inappropriate and inadequate means of suppressing a rebellion which would be worse than submission.

Then the tenor of the learned Judge's reasoning—in the course of which, passages taken from it are pressed into the service of our learned adversaries—is this: In estimating what the offence of giving aid and comfort to the enemy is, and when it can arise (always a personal offence, triable and punishable by law) he starts with the proposition that the maintenance of mere personal intercourse, by correspondence or otherwise, between the citizens of our loyal region and the citizens or residents of the territory in revolt, is not a common-law offence under the Constitution of the United States, and then shows what the rule of the law of nations is—which is stated to be that “war interrupts the commerce of the hostile nations, the intercourse of every citizen with the other,” but that in a civil war there is no such necessary interruption of mere intercourse between loyal citizens of one region and loyal citizens of the other, and that, under the law of nations, there is no personal guilt attributable to the maintenance of intercourse between the citizens of one nation and the citizens of the other, but that the penalty of the confiscation, capture, and condemnation of the property involved is all that happens, so that no personal crime arises even there. By the common law of England it is a misdemeanor to hold intercourse with the enemy; but his Honor had rejected the common law, in the statement that in federal jurisdiction there is no common law. Then the point was, how far is there an interdiction of communication as

matter of statutory prohibition, and what penalties are annexed to it; and the act of 1861 is appealed to as the measure and extent of the prohibition by the Government of mere intercourse harmless and innocent, that is not hostile in intent to the Government, which would be otherwise permitted. Then the learned Judge says that under that act the only penalties introduced, the only consequences of infraction, are the confiscation of the property or the vehicle thus involved, and that no personal crime is imputable to mere intercourse between loyal people with loyal people, against the mere form and effect of that act. But then the learned Judge warns the Grand Jury, as representing the criminal inspection and inquisition of the community, that if the people on this side of the line of hostilities hold communication, commercial or otherwise, with the community on the other side, with the view and intention of giving information, supplies, assistance, in any form, to the rebellion and its purposes, they place themselves in the condition, not of penalty under the act of 1861, but of penalty under the general criminal statutes punishing treason or connection with treason.

Now, I put it to the Court, and I think consonant with the sense of the learned Judge who delivered the charge, that there is no authority to be derived therefrom in support of the sentiment that we are reduced to personal war which would be wholly ineffectual, and cannot resort to territorial war, which would be and must be the only means of success against the rebellion.

The 4th proposition attributes to the state of war, thus existing, and between the parties to it thus described, all the powers of public war, including the right of blockade, and including the right of maritime capture, as enemy property; and I shall not think it necessary to ask your Honors' attention to the authorities collated under that point. By reference either to well-recognized general principles or

to leading cases, your Honors' attention has been sufficiently drawn to this, I believe, indisputable fact, on authority, that whenever the actual condition of a nation prosecuting its right by force against another nation or against a rebellion, exists in fact, the public law of the world insists upon it that the laws of war shall intervene, shall regulate, shall moderate, shall assuage mere violence of force; and that the method and the only method by which, in the application to public, international war, these ameliorations have been introduced and have been submitted to, in the interest, and by the right and power of the belligerents, is, that the laws of war, in their secondary coercion on the trade and on the status of the warring populations, give efficacy to the power of war, while they rob it of its violence, and of its cruelty, and of its carnage. So, in civil war, where there is much greater reason for the intervention of its humane influences, we see it, with equal impartiality, introduce its secondary, coercive, powerful rights of repression on the rebellious region and people, as if it were a community subject to, and sensible of, the impressions which the power of war in these terms makes.

#### SECOND DAY

I had reached, if the Court please, a consideration dependent upon, and forming a part of, the more general propositions which I had the honor of submitting to your attention, and which had brought me to the 5th proposition on the 26th page of my brief: That war is essentially, and as much as anything in human affairs, a question of actualities, is apparent to our reason and is obvious on the pages of history. War comes of itself, unwelcome generally, unbidden frequently, introduced by no preparation of law and no solemn warning. If this be so, it is apparent that whatever solemnities are wanting, and whatever chains, or obstructions, or control the interior structure of

a government seeks to interpose, or does interpose, to its rash or capricious introduction, nevertheless if war appears, wanting any solemnities, and against and over all these checks and obstructions, when it is present, when it maintains position, when peace is driven out, when the laws are silent—whether they ought to be silent or not—war rules, and gives its own laws.

Now, the rules and laws of war have no respect whatever for the methods, the purposes, the protection, the discriminations, the happiness, the prosperity, of peace. All these delightful and necessary qualifications of human affairs are included in the word "peace," and they have withdrawn with it, and are to be restored only in the train of peace. And the methods of war, and the laws of war, have no other purpose and no other *rationale* than, by suppressing and destroying the opposing war, which is the impediment to peace, to restore peace. But it wastes, in civil and disorganizing efforts to maintain peace during war, none of its energies which are applied to the complete restoration of peace. A peaceful war will bring back no peace, but one full of the elements and future threats of war. The means are abundant to secure the end, which never can be secured except by the observance of the means. My learned friend, Mr. Lord, in his discussion of this subject how war may originate and be in possession of the situation, was satisfied to hold and declare that even in respect of a foreign nation and the introduction of international war, the force of the Constitution, which entrusts to Congress the duty and the power of declaring war, makes it necessary that war, waged against us, *ad exteros*, war denounced or declared against us, *ad exteros*, did not put this nation at war, in the sense that the *status* of its people was changed from their peaceful relations abroad and their peaceful relations at home. He rested, or arrived necessarily, if not in his own reasoning, yet in the course to which he tended, at this: that, in that situation

between two nations one may be at war with the other, and the other at peace with the first; that the moment of the incipient hostility had changed all the attitude and relations of the subjects of that power by the initiation; but that the subjects of the other power, in their relations among themselves, and towards the enemy, were left unchanged until their own nation intervened. Such a proposition finds as little support in the authorities as it does in the necessary reason of the matter. Our wars have always been in the form, so far as Congress has intervened, of recognition of the situation of war as existing. The preamble to the Mexican War Act is familiar to us. The act—there being no preamble—of the war of 1812 is in the same sense and to the same effect. It does not take the form of denouncing war against England, which is the sense in which “declaring war” is used by the publicists and in the Constitution—*denunciare bellum*, to declare and denounce war, as the affirmative action of the Government so entering on its prosecution. But it declares an existing war, using the phrase in the sense of ascertainment, promulgation, publication.

But does not a unilateral declaration of war, which is the phrase of the publicists, put the other nation at war? I ask your Honors to note, on the margin of page 27, a reference to the case of the *Eliza Ann*, 1st Dodson, 247,—a case which is on the brief of my learned opponents, but not in this connection. Sir Wm. Scott says:

“War may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not a mere challenge to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may, perhaps, think proper to act on the defensive only.”

There is no such thing between nations as one at war with the other and the second at peace with the first. And on



this very matter of adverse hostility commenced, or war denounced, changing the situation of the subjects of the other power, without the least intervention of their Government, and from the date and fact of the adverse hostilities, without even its communication to the second power, I ask your Honors' attention to the case of *Oom* against *Bruce*, 12 East. 225. This was an action to recover back a premium of insurance; and the question was whether a state of war existed at the time the insurance was effected, so as to render the policy void. The case was in a British court, between two British subjects. Hostilities had been commenced by Russia against England the day before the insurance was effected, but it was not known to either party at the time. For the defendant it was insisted that nothing which was done by Russia, even if it had been known here, would have bound British subjects, until the state of war had been known and recognized by their government. Lord Ellenborough says:

"The commencement of hostilities by Russia against this country placed the two countries in a state of hostilities and made the subjects of Russia enemies to the country at the time when this insurance was effected. Formal declarations of war only make the state of war more notorious, but, though more convenient in that respect, are not necessary to constitute such a state."

Now, no distinction can be drawn in the application of such a case as this, from any diversity between the British Constitution and our own. The British Constitution attributes the power of denouncing war to the Crown, ours to the Congress. But the Crown of England had as little declared, as little accepted, as little known of, acquiesced in, or made the nation a party to, the state of war introduced by the Russian hostilities, as if it had been attributed to Parliament, as it is with us to Congress.

I have said to the Court that international law, and munic-

ipal law, as it retires before the law of war, contemplate alike no divided empire of war and peace. When war has begun, peace is ended; when war is ended, and not till then, peace is restored. The maxim, *silent leges inter arma*, is not so much a sentiment or a principle as it is a fact. Not that the laws ought to be silent, not that the laws wish to be silent, but that law speaks, when it speaks at all, with a potential voice, not of persuasion, not of entreaty, but of command; and when its command is taken from it, its voice is silent till its command is restored. When the execution of the laws is sought to be put in operation under the peaceful power of government and by municipal authority, and it finds the culprit against whom its writ is to be executed, hedged in by armed defenders in the array of war, the ministerial municipal officer reports that the process cannot be served by reason of this warlike protection and defence to the culprit. The Court, then, is silenced for the future; and thereupon the appeal is to the Government that peaceful administration cannot execute the laws. No feeble, no querulous, no undignified attempts to skulk, and penetrate by stealth and fraud those lines of war, are attempted; but the Government is advised that when the power of war confronts municipal authority, municipal authority is overthrown, and that there is neither faculty nor strength to restore it but by some mode and power commensurate with that opposed to it. And that might, and that strength, whatever you may call it, is superior force. Pursuing no laws but the laws of force and strength; and that is war.

The record of the Hebrew Commonwealth furnishes an instructive illustration of this necessity—that peace and war shall not exist together. The war declaration of the Hebrew was: “Beat your plowshares into swords and your pruning hooks into spears,” and—the war ended—the authoritative announcement of peace was: “Beat your swords into ploughshares and your spears into pruning hooks.” These imple-

ments of war and peace are so little needed at the same time that the same materials may serve the nation's turn for either state.

The case of *Elphinstone vs. Bedoochet*, which is on my brief, in 1st Knapp's Privy Council cases, illustrates, by an actual decision of the Privy Council of Great Britain, the proposition of Lord Coke's familiar statement and of Dr. Phillimore's announcement as a principle of the law of nations, that either war or peace is the condition in which a nation is; and the law, international or municipal, contemplates no transitional or intermediate state. Whenever, therefore, an offence, whether it arises for criminal punishment or for civil redress, is brought to the cognizance of a court, and the situation discloses a controversy of whether it was peace or war, the municipal court looks at that question and, if it be war, leaves the crime and leaves the personal or civil injury to be disposed of by the law and the tribunals of war, or recurs to the justice or favor of Government. It never undertakes to say, there being war, "we will treat of this crime or of this injury according as we think the war motives right or the war motives criminal." Not in the least. If it be peace, then it proceeds against the accused, or in the maintenance of the civil rights according to municipal law, and treats it according to the full measure of right and of obligation under municipal law.

Now, this case was an action of trover brought against Lord Elphinstone and one of his principal military officers by an East Indian claimant, for about thirty-six million rupees. The court in India gave judgment for the plaintiff for 1,700,000 rupees, making the distinction in the amount of damages accorded between that part of the property of the plaintiff seized by the public military officers who were sued, which was his private property, and that which was the property of the East India Government, which formed part of the capture. The statement of the case in its circum-

stances is somewhat prolix and full of detail; but the note sufficiently discloses its main features:

"The members of the provisional Government of a recently conquered country seized the property of a native of the conquered country, who had been refused the benefit of articles of capitulation of a fortress of which he was Governor, but who had been permitted to reside, under military surveillance, in his own house in the city, in which the seizure was made, and which was at a distance from the scene of actual hostilities. Held: That the seizure must be regarded in the light of a hostile seizure, and that a municipal court has no jurisdiction of the subject."

Very learned arguments at great length were presented on the one side and on the other by the leaders of the British bar; and thus briefly is the case disposed of in the Privy Council, Lord Tenterden giving its opinion.

"We think the proper character of the transaction was that of hostile seizure, if not *flagrante*, yet, *nondam cessante bello*, regard being had both to the time, the place, and the person; and consequently that the municipal courts have no jurisdiction to adjudicate on the subject, but that, if anything was done amiss, recourse can only be had to the government for redress. We shall therefore recommend it to His Majesty to reverse the judgment."

Now, thus determinately and simply, on no general reasoning or unsupported theory, does a respectable judicature deal with this question of peace or war. Lord Stowell says, that Russian hostilities, commenced the day before this policy of insurance was issued, made a state of war, and thereafter, all the laws of private personal relations fell under the law of war. So the Privy Council, by Lord Tenterden, says: "*nondam cessante bello* this act was done; we have no connection with it, for peace is not restored till war is over, and the sovereign, not the court, must deal in this transaction for the redress of any grievances inflicted, the restitution of any rights infringed."

Martial law, if the Court please, which has formed a subject of judicial, public, and political discussion in the country, growing out of the condition of affairs, has also formed a subject of discussion by publicists. It is a local and limited application of the law of war, sometimes in your own country—and, by that, I mean the country which is loyal and faithful and supports the Government—sometimes in the enemy's country; and under very peculiar circumstances, an intrusion into the neutral territory may occur, overruling the law of nations, which does not respect lines of neutrality. Now, all this subject of martial law,—most useful for the preservation of the law of peace, of the municipal authority, and for the protection of the general rights of citizens under the Constitution—all this rule, all this law, and all this nature of martial law, its rightful and authoritative existence, its limit in space and in time, all turn upon this doctrine of the actualities of facts which determine war or peace and determine martial law or municipal law. General Halleck, in his treatise, says:

“What is called a declaration of martial law, in one's own country, is the mere announcement of a fact. It does not, and cannot, create that fact. The exigencies which, in any particular place, justify the taking of human life without the interposition of the civil tribunals, and without authority of the civil law, may justify the suspension of the powers of such tribunals, and the substitution of martial law. The law of war, or at least many of its rules, are merely the result of a paramount necessity.”

And General Cushing, in his opinions, to be found in volume 8 of the Attorney General's opinions, has this reasoning, which presents the matter very plainly:

“There may undoubtedly be, and have been, exigencies of necessity capable, of themselves, to produce and therefore to justify such suspension of all law and invoking, for the time, the omnipotence of military power, but such necessity

is not in the range of mere local questions. When martial law is proclaimed under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact rather than the legal creation of that fact. In a beleaguered city, for instance, the state of siege lawfully exists because the city is beleaguered, and the proclamation of martial law in such case is but notice."

Now, what martial law is, in its limited sphere and its temporary maintenance, that is martial fact. War, in its larger feature and its more extensive relation, is fact, made fact sometimes by the voluntary, purposed, and premeditated activity of a nation through its forms of law; made fact frequently against such purpose, certainly against such avowed purpose, but however made, it is limited by fact.

If the Court please, I have but a single further general inference to ask your attention to, growing out of these propositions. And it is this: That, as the state of war arises and exists as a matter of fact against a government, whether it wills it or not, whether it has induced it or not, whether it wishes that it shall continue and be prosecuted or not, the powers and the duties of every government against which such a war thus arises, to oppose, overwhelm, and subdue the war, whether it be foreign or whether it be domestic, are themselves facts having their strength and their dimensions altogether measured by the power, the efforts, and the purposes of the war that is moved against the government and the nation. You cannot codify a war that is to be prosecuted against you. It recognizes no measure but the strength and the purpose of the hostile nation that comes into the conflict. And you cannot advance, in any municipal system or in any constitutional structure of a nation, any such constraint, any such impediment, any such feebleness in its power to oppose war as makes it necessarily the victim of a surrender when power shall be moved against it in the form of war, outside of the limits or beyond the strength that the nation is per-

mitted to use against it. No, just as truly, just as necessarily as in the case of private war arising between two persons on the right of self-defence, just so necessarily, just so truly, when war arises between two independent powers, whether they be independent political powers or howsoever otherwise they come to be adverse warring powers, there is not any measure to the right, nor any measure to the faculty of either nation as against its enemy, but the strength, the power, and the resources of the nation. Its right is to defend itself by whatever means are necessary; and the means that are necessary are to be governed, of course, by the authorities of the nation, but are to be governed as reasons of state, and of policy and of military prudence and military judgment. It will be found that all arguments that seek to reduce or restrain the exercise of the power of a nation in war, in which it is engaged either with or against its own will, and any effort to reduce the power and authority of a government that has been put to the necessity of exerting the powers of war, to suppress a rebellion or insurrection or whatever you call it—any interior disturbance that has escaped the bounds of civil power and needs recourse to the warlike authority of the nation—anything that tends to hamper, reduce either in the measure of its strength or in the variety of its exercise the authority or the duty of the Government to defend itself, are contrary to the first reason of the law of self-preservation and contrary to every proposition on, and justification of, the cause of war.

The Government, in time of peace, protects itself naturally and easily. The Government, in time of war, can protect itself, can sustain itself, only by the means of war. And, as Sydney says in his *Treatise of Government*, "it is impious to say that those who oppose the law and, by their strength and power, are able to protect themselves from its peaceful authority, are to be saved from the use of all the means which the nation has, to overcome their resistance. Against such all are just."

Now, the Court will perceive that there is nothing in the idea that the powers of war are to be executed in order to reduce a rebellion to the control of the civil authority, that makes the powers of war, thus applied and tending to that end, in the least an exercise of municipal authority or of punishment towards any body or any thing. The punishments are to come, if at all, when the law that can authorize and can support them is renewed. It would seem, therefore, that if a war arose, before the statute of 1795 was passed or before the statute of 1807 was passed, whoever properly represented the authority of the nation to execute the powers of peace and the powers of war—in distinction from enacting them—to execute the laws by the means of peaceful authority or, by the means of war, to reduce under peaceful authority,—whatever power thus represented the nation must, in emergencies and under necessity, be clothed with all authority which the nation could second and support by its strength.

But, if the Court please, in the actual circumstances of this case, under the Constitution of the United States and under the existing legislation of Congress, there is no need to resort to these general, though absolutely true propositions of the law of self-defence. We are a nation that possesses, as matter of fact, all the energies and all the material resources which make up a powerful people, powerful in all the relations of peaceful influences with other nations, powerful in war; and we have a Government that is formed on no principle of feebleness or pointlessness in the arrangement of its authorities, and in its being the head and leader and ruler of so great a nation, formed wisely by those who constructed it, on no theory that peace was always to prevail, although they desired it. It is fully furnished with all the weapons at once, and with all the shields, that belong to the conflicts of war. And this was in full exercise, not only in the fundamental law of the Constitution, but in all the subordinate legislation which needed to proceed from the action of Congress, at the



time this revolt broke out. There was nothing of limit either in the Constitution or in the laws that had provided for an emergency of a small insurrection, of a small rebellion, of a small invasion; but there was, in the department of this Government having political authority, a full measure of strength and provision for an invasion that should at once bring along the Canada line an army of 200,000 men, and along the coast an invasive naval power of 500 ships of war. So, too, for rebellion, if it should gain the awful front and tremendous strength that this did before the war powers of the Constitution, under the laws and by the authority of the nation were to be levelled at it—so far as the authority of law went, there was as great and adequate a provision for a rebellion that should seek to maintain itself over half the territory of the Union and should press into its service one-third of its population. So, too, it was as well prepared, as completely provided, against a rebellion that should have a sea-coast of that extent and should seek to draw for its supplies and for its revenues on the commerce of the world. Whether the Government had the physical force, had the arms-bearing population, had the munitions of war, had the armaments by land and by sea, that were adequate, were the sole questions to be regarded by the political authorities of this nation. They did not need to wait an hour. They did not need to await support from any other department of the Government. The judiciary was not to be consulted at all; the Congress, although it was proper that it should be called into the councils of the Government at as early a day as possible, had yet not left anything deficient, or defective, in the arm of the Executive which made it necessary that the nation should be rent before Congress could be convened.

Now, our learned friends do not seem to dispute that there was some power in this Government, that there was some power to do something that was not, in the least, within the range of peaceful authority or within the operation of muni-

cial control; but they come to the point of division, that the Government could do only certain things, that it could not do this or could not do that. And yet there is nothing in their discrimination between what the President could do under existing Acts of Congress, could lawfully require, and what he could not lawfully do and could not lawfully require, except a discrimination as to what was necessary, what was useful, what was proper, what was beneficial, toward the end proposed. That single distinction which I shall hereafter meet more distinctly, is: That although every act of direct force and of immediate weight and pressure on the rebellion could be pursued by the Government, yet anything that came into judgment, into sentence, into judicial inquiry, could not derive its origin and its system of adjudication from any acts of the Government without special introduction and direction *ad hoc* of specific legislation of Congress.

Now, I may not have much occasion to quarrel with that as an abstract proposition, because I find nothing in the nature of the prize arrest and the prize adjudication and sentence which partakes, in the least, of the qualities of subsequent, retributive, punitive justice. It is right that we should see, not only what powers the Government had by the very nature of its Constitution to defend itself, but also understand how these powers were distributed, and no fault is rightly found as to the exercise by the Federal Government of what was rightly imposed upon it. I have collected under my 7th proposition, a reference to the heads of the Constitution touching both Congressional and Executive authority in this matter of the legal power of the Government. Congress has power to declare war. And on this our learned friends insist, as carrying the extensive consequences of non-declaration of war by Congress that they have claimed.

Now, if your Honors please, will it be contended before this Court, has it ever been made a matter of professional

opinion or argument, that this clause giving to Congress the right to declare war—that is, to denounce war—had the least reference, in the sense of the framers of the Constitution, or in the proper interpretation to be given to it, to a state of rebellion or civil war? Is it true that this phrase of the Constitution that has relation solely to the functions of the Federal Government as a representative of the national strength *ad exteros* and that puts in this branch of the Government the power to denounce or declare war, had reference to giving to Congress the exclusive control of the question whether rebellion or insurrection should be met by the power of the Government? Certainly Congress may have control, certainly Congress may have authority to this or that extent over these internal insurrections or rebellions, however they may arise. But no one, it seems to me, can say that under the clause of the Constitution which says that Congress may declare war, the power of the Government, or the duty of the Government, or the resources of the Government for the suppression of the rebellion, are to be derived. It is not the will of Congress that is to determine whether rebellion shall be a war which is to be frowned upon and suppressed. The Constitution, by creating the nation, makes rebellion against it a crime. Duty may be betrayed. The nation may be surrendered, by Congress, by the President, but not in pursuance of the Constitution.

The other warlike powers are, to raise and support armies, provide and maintain an army, make rules for the government of the land and naval forces. And these, indeed, give to the National Legislature the complete control of the levying, the organizing, the preparation, of the national forces by land and by sea. And, as has been made the matter of some judicial interpretation, as it is of the necessary sense of the clause, these powers to raise armies and navies gave, of course, to the Federal Government, by its Executive or Congress, authority to use the army and the navy in the

form of war, and in war, domestic or foreign, as the nature of those material forces may indicate. Now, your Honors will find that the next clause is the only clause of the Constitution that has specific relation to any power in Congress in the very matter of domestic rebellion and insurrection.

“14th. To provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion.”

Now, if we are to stick on the mere phrases of the Constitution as giving power either to the Executive or to Congress in the matter of the suppression of the rebellion, your Honors will perceive that there is here a distinct limitation of the force and the authority of Congress in the matter of the suppression of rebellion or the repression of invasion—“provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion.” But it is not necessary to say that such a construction overlooks the fact that Congress and the National Government, by its very constitution, had control of the national forces—the land and naval forces of the Government—for all the purposes of enforcing its authority; and this was simply a provision that they should have equal control, in this emergency, of all the arms-bearing population of the country, thus taking from the States themselves their own organized militia whenever the national power was necessary to be exercised either towards a foreign nation or in domestic troubles.

Now, that exhausts, except the provision for organizing the militia, when thus introduced into the service of the Government, the specific war powers of Congress. How, then, is the President made, under this Government, a head or leader of its material strength, of the energies of its people, and of all its warlike resources? Why, in the very constitution of his office which says that the executive power of this Government, all the executive power of this Government, all that power which is execution in distinction from legislation,

and judicial determination, all that there is of a Government in its divisions, that does not go to legislation, that does not go to judgments of courts—that is all in the President of the United States. There cannot be more than that lodged in any Chief Magistrate, whether he be called King or Caesar, excepting that the Constitution, by its divisions, of what it attributes to the legislative authority and what to the courts of law, determines and limits, as may be, the extent of Executive power. But, that the waging of war, the conducting of war, whether it be foreign or domestic, the suppression of rebellion, by executing the power of the nation, is wholly in the President under the simple authority, cannot be denied. Congress cannot carry on the war against rebels or the war against foreign nations, and the courts of justice do not intervene at all.

But again: the President, by the solemn induction into his office, is charged with every duty, and has awarded to him every power contained in the Constitution which is necessary to the maintenance and obligation of his oath. His oath is, that he will faithfully execute the office of President of the United States, and will, to the best of his ability, preserve, protect and defend the Constitution of the United States. What is meant by the President's undertaking to the best of his ability, to preserve, protect and defend the Constitution of the United States? It is not the best fidelity to his personal duty, or to the best of his personal powers, but that he, to the best of his ability with which he is clothed by the Constitution, to the best of his application and exercise of the public authority with which the Constitution has clothed him—and that public authority is the whole Executive power of the nation. He is thus made, in form, Commander-in-Chief of the Army and Navy and of the Militia, and is obliged to see that the laws are faithfully executed.

Now, if the Court please, let us suppose a case. Suppose that an insurrection or rebellion, of such magnitude that it

threatens the destruction of the republic, arises during the recess of Congress, and before the legislation of 1795 and 1807—is there any power to save the Government, it being clear to human intelligence that it must be saved within sixty days or destroyed? There is a great national army. It has strength enough to suppress the rebellion. There is a great navy. It has strength enough to cut off the resources and supplies of the rebellion, without which it will wither and die. There is a great arms-bearing population of loyal and valiant men in the nation; and there is a President of the United States and a Constitution, clothing him with these powers. Shall the Government stand or fall? That is the proposition. It is to stand, by salvation within sixty days; or it is to fall, in the ruin to be completed within that time. Is the wisdom, is the frame of this Government so established that in silence, from respect to law, in reverence bowing before the Constitution, the Government, the law, and the Constitution are involved in a common ruin? Will any lawyer say this? Will any Judge say this? Will any statesman say this? Will anybody say that, with this loyal army, this loyal navy, this loyal arms-bearing population, this faithful President who has sworn to use all his ability, this strong Constitution that has made him commander of all this army, this navy, this militia, and the head of all this loyal population, the executive authorities of Government must, in silence, see the ruin of the whole? Yet, that is the proposition. Or if, *post hac*, a judge or a lawyer can decide or argue that the President cannot do this and cannot do that, and if “this” and “that” were all that could save the country, then it would follow, from such argument or decision, that the fabric is so built that it must be overthrown on the happening of such a concurrence of circumstances as I have named.

Now, this proposition may be met. It may be met in the councils of the Government. It may be met in the recesses

of the judicial determination. It may be met in the heart and in the breast of every citizen—and there is no answer but this: that whatever the strength of the nation can do is lawful, is in subordination and in obedience to the Constitution, done under the authority of the President.

But supposing, if the Court please, that instead of Congress not being in session, a majority of its members are involved in the treasonable councils and are well-wishers to the rebellion,—what then? Is Congress the sovereign of the nation? Why, the whole theory of our political institutions is, that the sovereignty is with the people; and of its sovereignty there is withdrawn, in attribution to state or federal authority, only that with which it has parted. We have no king given us, the representative of our power, to whom we are subject, and within whose power all ours is included. No; this is our proposition of sovereignty. And if you do not attribute to Congress or to the Executive the acts of sovereignty which can save a nation when it needs to be saved, then that nation has that act of sovereignty itself,—for it must be saved, and, if it be a sovereign, must have a right to be saved.

But, if the Court please, who will say that a rebellion that includes a majority of Congress makes the rebellion the law and the Constitution and the right, and that the President and the power of the country, when it undertakes to maintain the old Constitution, the united territory, the ancient nationality, is revolution, and that Congress is the Constitution, and the permanent, and the pre-existing Government? That is the very nature of this government of the people under the written Constitution. As the people are not sovereign, so Congress is not sovereign. But the Constitution—that is the sovereign and its law—and whichever part—the legislative or the executive—rebels against the Constitution, is the rebel; and if it seeks the means of force and of arms, it is at war. If the rebellion be made by the

President in office, it is a rebellion against the Constitution; and if Congress be loyal and faithful, it assumes the powers of Government and takes its measures to suppress it. So, too, the President. And so, finally, the strength of the nation under the lead of its constituted authorities, by its flag, and in support of its Constitution, is not unfaithful and is not revolutionary, whatever be the form of the rebellion against it.

Now, the general legislation of Congress, exercising its powers constitutionally had furnished an army and navy; and there was in existence an organized militia when this rebellion broke out. And there were also, on the statute book, statutes of permanent application and wise prevision which had undertaken to make lawful and formal, by the concurrence of all the powers of the Government, the authority given by the Constitution, that should meet any such case. And this brings me to the consideration of the act of 1795.

Now, if the Court please, lest it should seem that in the more general propositions which I have had the honor and thought it necessary to submit to the Court, I have trusted to my own deductions or to my own views of the simple reasons on which it all rests, I have asked the attention of the Court, on my brief, to a few simple and conclusive sentences from the authoritative pen of Hamilton:

“The circumstances which endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed upon the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence. This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer, by argument or reason.



It rests upon axioms as simple as they are universal. The *means* ought to be proportioned to the *end*; the persons from whose agency any *end* is expected ought to possess the *means* by which it is to be attained."

I have had occasion, if the Court please, to present no more fundamental, no more general propositions than those which Hamilton has pronounced so plainly, that "argument can only obscure them," and as simple as they are universal.

Now, the Act of 1795 does not undertake in the least to say what strength or head of rebellion or of invasion or of domestic disturbance in a State shall exist before the authority of the Government is to be exercised. As little does it undertake to say how much power, or in what form, the Government shall bring to bear on either invasion or rebellion. Nor has it undertaken to draw any distinction between its purpose and the public necessities which may require the application of the powers of war in the one case of invasion, more than in the other case of rebellion. The authoritative part of the law provides that whenever the United States shall be invaded or be in imminent danger of invasion from any foreign nation or Indian tribe—which is every form and every quarter in and from which invasion can be expected, in all human probability—"it shall be lawful for the President of the United States to call for such number of the militia of the state or states most convenient to the place of danger or scene of action as he may deem necessary to repel such invasion, and to issue his orders for that purpose to such officer or officers of the militia as he shall think proper."

Now, if the Court please, when we take, in connection, the statute of 1807, which has arrayed under the authority of the President the whole power of the land and naval forces proper of the United States, do we not see that the case supposed by that statute for the exercise of the powers given by it to the President is a case of war?—a case of war, threatened or commenced from abroad, in the form of inva-

sion, and that the powers that are given to the President have not the least quality of municipal authority? In other words, is it not apparent that the case of war coming upon the country, and the provision of war to meet it is the case and the authority of that statute? Nor is there any limit whatever. The country is to give all the militia, all the navy, all the army; and the Executive is to use them as the occasion of the conflict or of the danger may require.

So, too, in the next case:

“In case of an insurrection in any state against the Government thereof, it shall be lawful for the President of the United States, on application, etc., to call such number of the militia as he may judge sufficient.”

This refers to the case of an insurrection against the authority of a State, but, as is adjudicated and as is necessary, an insurrection against a State which is entitled to the protection, and forms a part of the frame of the general Government is an insurrection, in a secondary form, against the authority of the Federal Government. Now, here all the war power is given—the army, the navy, and the militia. There is no limit. In the State of New York, with its population of four millions and in its connections on the lakes and on the sea, an insurrection might require not only the theoretical power of war, so distinctly noted and affirmed by the Chief Justice giving the opinion of the court in the case arising in Rhode Island, but might require the actual application, in its forms of blockade, in its forms of all the oppression and suppression, of war before it could be reduced. Is there anything in that statute that limits the insurrection in New York to being a municipal disturbance, under municipal authority? May it not have possession of the port of New York and the ports upon the lakes, and have control, by usurpation, of the resources of the State and of its militia of 400,000 men? And is not this a case where, clearly, war is to be pursued?

Then we come to the second section:

"Whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the power vested in the marshal by this act, it shall be lawful for the President of the United States to use the militia."

And by the Act of 1807 he can call out the army and navy.

Now, is not this a case of war? If it were necessary to find, in formal congressional action, a provision recognizing that civil authority and peaceful control of Government was gone, and that the power of war should be applied by the President, do we not find it in this Act?

What are the English definitions, what are the definitions by the publicists, of a state of war excepting that which is very distinctly figured in this statute? that is, when the laws cannot be enforced, and the power of the marshal is inadequate to enforce them. What is the power of the marshal? It is the entire peace power of the country, that, under its Constitution and its laws, is to be brought into action. And when the exhaustion of the peace powers of the country has occurred, what is there left known to the publicists but the war power?

I say, then, in the 8th proposition that the cases put by the statute are a war, the remedies are a war. Under these statutes, under the Constitution, and in presence of the rebellion such as is known, such as has been stated by my learned associates and indicated by myself, this Government came to act. Now, we have left only to see what it did do; it being left to the Government, its Executive, in its administration of those great authorities given by the Constitution and this Act of Congress, to determine, beyond the subsequent judgment of any court whether it should determine right or wrong. (That is well adjudicated.) What did the President do? And what are the faults, or what the

excesses, imputed to his action, as bearing on inquiries that are open in these prize causes? Your Honors will not be detained by any recurrence on my part to the terms of the proclamations or of the message of the President. Suffice it to say, that on the 15th day of April he called forth, as I submit to the Court, the war power of the country to suppress this rebellion. I have not heard that any fault is imputed to that proclamation calling for the 75,000 men. If he had called for 750,000, it was in his discretion. On the 17th of April a new movement was made on the part of the rebellion. What was that? It raised the threat and prepared the execution, of the suppression of the commerce of the United States. A proclamation for Letters of Marque and for Privateers, inviting all who would take commissions from the rebel government to prey upon the commerce of the United States was issued. Thus, besides being a personal or treasonous war, and besides being a territorial war, it was made by the rebellion, on the 17th of April, a war against the trade of the United States, to drive our commerce from the seas and to reduce the resources and supplies of the national strength. On the 19th of April, meeting blow by blow in direct force, the President of the United States issued his proclamation of blockade, establishing the naval method of war against the rebellion indicated by the necessities of the Government and its duty to the people. What did he mean by it? Did he mean that it was a peace blockade? Did he mean that it was a blockade of obstruction? Or did he mean that it was a blockade under the war power and within the terms of the law of nations? Did he mean that it was to be confined to the forcible exclusion of vessels and was to carry none of the sanctions by which a blockade is supported under the law of nations? No. He in terms directed that "the vessels are to be captured and sent in for adjudication as prizes." We had thus an indication not to be mistaken, an interpretation not to be withstood, that the

President of the United States did undertake to use the force of the country for the suppression of the rebellion in its array of armies on land, in its possession of the territory of the United States which it had wrested from the power of the Government and against its trade as an answer to its attack on the trade of the United States.

Well, now, Congress assembling on the 4th of July, the President of the United States informed it that he had called on the war power of the Government under the Constitution and the laws. We then are able to meet and completely repel the suggestion of our learned friends that though the President might have done, yet he has not in fact done, such acts as entitle us to claim that the war power of the Government has been exerted for the suppression of this rebellion. In its nature it is sufficient, but in the intent of the proclamation, in the message to Congress, and in all the action of the Executive, it is very apparent that he exerted this power.

But, if the Court please, Congress came together, and it did pass certain acts. Every one of these captures was made before the passage of any Act by Congress at all touching the condition of the country. But Congress did pass certain Acts, and I think there is some diversity of opinion and statement between our learned friends as to what the effect of those acts is. I understood the Boston propositions to say that these subsequent Acts of Congress do retroact upon, give meaning and effect and purpose to, the proceedings of the President, make them rightful and in law effectual; but then they claim that this retroactive effect and interpretation do not make the acts of the President a full exercise of the war power against trade or against the territory, but only give them a personal form of coercion. On the other hand, I understood Mr. Lord to argue that there is and can be no retroactive effect whatever in the legislation of Congress on the predicament as existing anterior to, and at the time of, the captures in question. So, too, I do not

understand our friends to argue that there is not a war now. I do not understand Mr. Lord to argue that this is not a war now, including all the powers and all the rightful exercise of war, in maritime capture, in blockade, in condemnation of prize, and in what not. But he says—and this is his fundamental proposition—that although a war *inter gentes* from its waging and prosecution, on the mere fact of its existence, imports to itself, under the law of nations, all the authorities and methods known to that law, yet a civil war derives only, and is limited by, in its modes and powers, such authority as the legislation municipal and domestic shall give it. And he says that the Act of July 13, 1861,—if I understood him aright—does really introduce, under legislative sanction and authority, territorial war, with its consequences, which he deprecates, not in word and in form, for it surely does not say anything about war, but because it had undertaken by municipal law to effect non-intercourse between the loyal and disloyal parts of the country.

My friend, Mr. Lord, in his printed brief, has made a very extensive criticism on this act in a certain sense, which, I shall respectfully submit to the Court, a very few considerations will render inapplicable. I shall not insist, at length, on the meaning of this Act which has been so well presented by the brief and the argument of my learned associate, Mr. Dana. But this is to be seen on the face of it, that it was not intended simply for a special or temporary purpose, but that Congress, foreseeing that circumstances might at any time arise which would render it necessary, has given authority to have a custom house on board ship, or to close the port by municipal authority. That has nothing to do with the use of force in suppressing the rebellion. The fifth section seems to be the first and earliest that can be indicated as having any special influence on the war. What is that? In its nature—I will not repeat its terms—it is an aid and assistance given by municipal law to the

military action of the Government in separating the loyal from the disloyal territory. But my learned friend says that that first introduces the right to establish non-intercourse and thus furnishes the degree and consequences of non-intercourse.

Let us see how that is. We will first take it before the statute passed, where your military lines were drawn or may have been drawn. They were drawn from the city of Washington, or the city of Baltimore, or the shore of the Chesapeake across the country to Missouri. That was a purely military action of the Government and nobody here has disputed that it is lawful. Supposing that intercourse of any kind is attempted to be conducted across these military lines, from one side or the other, does not every person, does not every piece of property thus coming in contravention of the military line come under the law of war? Is it not to be kept out? Is it not to be seized? Is not the military permission to be what the commander-in-chief indicates both in regard to persons and in regard to the appropriation or destruction of property? Is this Act of Congress a repeal of that authority? After its passage, when the general finds that his lines are being traversed by commodities, by vehicles, by letters, by correspondence, and when he undertakes to apply the power of war to preserve his lines, is he to be met by the suggestion:—"Oh, I know it is unlawful, but the Act of Congress has fixed the measure of my authority and the manner of its exercise, bringing it under control of the municipal law, and when ever you show a warrant for my arrest I will yield to the law; but unless you bring this form of legal process in pursuance of the municipal law, I claim my rights as a citizen and pursue my lawful business, made unlawful, only by the statute"?

This statute is in accordance with common law, which makes trading with the enemy a misdemeanor; but does that save the ship of the British merchant and its cargo, pursuing

its voyage to Russia in contravention of the non-intercourse which war produces, in the capture and condemnation of prizes in the Court of Prize, sitting as a court under the law of nations? Not in the least; and all the pretence and application of these considerations to this legislation comes utterly without support.

But the Act of August 6, 1861, which in its terms attempts a full and thorough support of the acts of the President has, it is said by our learned friends, its vigor and operation only in the future and from its date, and makes war from that date. But why not for the past? I submit to your Honors that, on all the cases and on the principles of political control in the situations of war and peace, and on examples in our own history, so well presented to your Honors in the facts of General Taylor's conduct in the Mexican war, before the passage of the Act of Congress declaring it, there is nothing truer, nothing simpler than that, when the authoritative voice of the Government has been presented concerning the state of war, it is—at least, in the absence of some express limitation—received by the courts as an interpretation of the true character of the disturbances and hostilities. Will anyone contend, as a lawyer, that if General Taylor's battle of Palo Alto and Resaca de la Palma had been replaced by naval engagements or had been attended by naval engagements, or by naval captures of the trade of Mexico, or by the establishment of a blockade, as acts of force by the military authorities having the power of the country for that purpose reposed in them, the captures would have been discharged and restored because they were made after Mexico had commenced war and while we were resisting it by land and by sea, but yet anterior to the Act of Congress? Why, the proposition, within any rules of public law or any authority, is absurd. Now this is all—this time—that is so zealously sought to be saved for the protection of these particular vessels, between the 27th of



April and the time when Congress thus gave the voice of the nation, interpreting, not enacting, the state of war. The proposition goes no further, and it is met by every authority and by every principle of public law.

My learned friends do not explain themselves exactly as to what kind of a blockade, and what consequences, in maritime or naval power, this measure of the Government could rightly have. Our learned friend, Mr. Edwards, who represented the neutral or British position, our friend Mr. Black and our friend Mr. Lord, do not, any of them, seem to question the right of blockading the ports. That is to say, they justify the Government in blockading the ports, without any act of Congress. Is that a municipal regulation? Certainly not. Is it a war power then? Yes. But they say that there should not have been superadded to this actual institution of blockade the sanctions for making it operative and effective which the law of nations brings. What are those sanctions? Why, that any vessel preparing, any vessel designing, any vessel attempting, a breach of blockade is, at any part of its voyage, liable to seizure. They say, "You have a right to keep vessels in front of those ports, you have a right to stop any vessel going in, you have a right to send her off, but you cannot bring her into prize condemnation." But if you cannot bring into prize condemnation vessels seeking to break the blockade, how do you make the blockade effectual and operative? You make it operative, not by right of war but by mere power or scuffle in each case; and you collect about your ports the ships of all nations which have got that far without fault and without exposure of any kind. Well, if they got that far without risk and without exposure, they will get farther without risk and without exposure. If your limited strength is to send home to port vessels attempting to run the blockade, there to be released, your blockade is determined from the failure of your naval strength. Or if your right is simply to set her prow

about at night and she can come back in the morning, and you repeat the game over and over again, then you have a mere puerility of war.

What is the power of blockade? What is it, says Sir Wm. Scott, but the forcible prevention of access to ports? What is the forcible prevention of access to ports? It is like the forcible prevention of anything prohibited. It is not mere arrest; but it is arrest and detention, and infliction of consequences, whatever come from it. But my learned friend, Mr. Lord, seeing that that puerility of war would not do, says, "Oh, you may have the most terrible power of war; you may sink a ship attempting to violate the blockade." He says that if a vessel is bringing supplies (and I suppose he would say, if she were bringing contraband of war) you may sink her; but the law of nations is that, on the high seas, this execution of the law of war shall not be, and is not, permitted. The proposition of the law of nations is, these seizures of commerce, of ships and their cargoes, may rightfully be made, but you shall neither destroy nor appropriate, on this primary forcible execution of a right. You may, so to speak, seize the ships in the darkness and uncertainty of night, but you shall not destroy them there, and you shall not appropriate them there. You shall keep them till the daylight of the prize court can shine upon them, discover their features and their circumstances, and show whether their seizure is an execution of the power of war.

How does the law of nations enforce that rule? Why, if a belligerent power shall undertake to sink ships indiscriminately on the ocean—as my learned friends say it may—in order to maintain its war power, neutral nations, the authorities of the world, would intervene and say: "That is a power and right of war which cannot be executed in that way." There is but one case supposed in which the belligerent is authorized and justified, under the law of nations in destroying property—and that is when the condition of

the law of nations that the prize jurisdiction and sentence shall follow is rendered practically impossible by the belligerent possessing no ports. That is the law of nations which keeps the Alabama afloat and gives to it execution and appropriation at sea, without prize adjudication. And that is the only way and the only reason. How otherwise does the law of nations enforce this proposition that you shall not only not destroy but you shall not appropriate? Because by a universal proposition of the law of nations, the title to property passes only by prize adjudication. If the ship which a belligerent has captured and sought to appropriate should be found anywhere in the world, it would be no title, to be pleaded in an action of trover or replevin, that the ship was captured under the rights of war by a belligerent at war. Prove all that on the part of the defendant and still the plaintiff would have a verdict and recover the property. But prove further that the ship was captured and brought in for adjudication, and produce the prize sentence, and the defendant will have a verdict, whether the capture was under the laws of war or not. It is thus that the law of nations, wise and strong, secures the observance of this rule as the condition on which it will permit the exercise of belligerent rights on the open seas. It secures two great objects—first preventing the destruction of property, so that you shall not strike it out of the values of the world, so that the corn and the wine, the fabrics of comfort and of necessity that belong to the world for its use shall not be sunk in the bottom of the sea under the claim of belligerent right; and second, that neutrals shall not hold their position on the seas, subject to the discretion, the justice, or the good faith of naval commanders; but that the prize courts that make records and that bind their sovereign, shall have review of the captures.

Now, if the Court please, I will look, but a moment, at the question of enemy property as distinct from the rest, and then I shall submit the case.

**JUDGE NELSON:** In connection with your argument that the President, under the circumstances in which he was placed, has the power, can he grant Letters of Marque and Reprisal?

**MR. EVARTS:** That question, if your Honors please, falls, I suppose, properly under the same considerations (and your Honor's question as well as my answer is equally applicable to a foreign war commenced by invasion) and under the same principles on which this Court held that, by the law of nations, the mere existence of war, without the exercise of legislative authority, did not operate an appropriation or a right of confiscation of goods on land, never doubting, however, that it did operate a right of appropriation and of prize condemnation of goods at sea. Now, whether the President of the United States having a right to use the entire militia of the nation, having a right to use the entire navy of the nation, having a right to use the entire army of the nation, would also have a right to use the mercantile marine in the form of private ships of war for the purpose of prosecution of war must rest wholly on the question whether he, in the actual emergencies and needs which the facts of any given case had thrown upon him for the protection of the Constitution and the Government and the maintenance of the authority of both, as of necessity was obliged to recur to it. There is not any statutory authority, and there is not, in any terms in the Constitution, any authority given to him except to be commander-in-chief of the army and navy and to be the Chief Executive.

Now, my own judgment—if the Court will allow me to speak of what is so unimportant—is that when you come to the necessity of employing private armed vessels to maintain the authority of the Government, whoever has the executive power of the Government in that emergency can issue those Letters of Marque. But, if your Honors please, that question can never arise, except in a prize court and as

toward neutral nations. It never can become a question, when the authority is exercised in conformity with the interior structure by which the departments of the Government and the fabric of public liberty and safety are to be maintained. I know of no statute, or of no express clause of the Constitution which, in its necessary terms, covers this institution; but the whole armed power of the country falls within his powers as commander-in-chief, to be employed by him for the purposes authorized by the Constitution.

I understood your Honor to ask the question in reference to the existing state of the law, and not under any statute of law which should authorize, in case of emergency, of invasion, or of insurrection or of rebellion, a recourse to the system of privateering.

JUDGE NELSON: I only asked in reference to existing Acts of Congress, such as existed at the time.

MR. EVARTS: If there was such a general law, of course my argument that the President could use private armed vessels according to the law of nations would be applicable.

I come now from that question of maritime capture, and to the proposition that a prize sentence is judicial, in separate authority and effect from the act of capture. I do not know where my learned friends, who seemed to think that some of these acts by the Government might be warranted at sea, find any authority for any of them unless they can find authority for all of them to the extent that the Government claims. Before, then, the Act of July 13th, if the war power of the Government was not in existence, and if the prize judicature did not exist, for aught I can see, a Boston merchant could fit out a ship or vessel for the purpose of carrying contraband of war in the shape of consignments to Charleston, to loyal merchants in Charleston. I will keep him clear of the doctrine of constructive treason by carrying contraband of war to rebels in arms. But I do not see why, in good faith under a previous order from loyal citizens of

Charleston, a Boston merchant could not send down a cargo of gunpowder and rifles, unless the power of war of the Government exposed them to the application of the military, the naval, and the effective power of the Government to seize it. There is not any libel or information that could be filed in the district court or anywhere else, under any statute that can be found that could stop it. There is nothing but the power of war to suppress it. My learned friend, Mr. Lord, would meet that case in this way: "You can sink that ship at sea, but you cannot bring it in and condemn it as a prize."

Now, what is maritime capture in its essence, and in the mere quality of enemy property, as distinguished from capture for contraband or breach of blockade? In the first place I ask your Honors' attention to the well-settled proposition of prize law, and that is, that the prize adjudication always proceeds on the ground that the thing condemned is enemy property, although it be condemned, being in fact neutral property, for breach of blockade or for carrying contraband. The proposition is this: that a belligerent has no right except against his belligerent—that is the beginning of it—but that neutrals, by contravening the law of nations and not respecting belligerent rights may get themselves into the attitude of being, *pro hac vice*, enemies from their conduct. The two main features are, carrying contraband which exposes vessels to capture anywhere on the sea, and attempting to break the blockade which exposes them to capture at any time that the voyage is meditated, or the voyage is undertaken. But what right have we to take them? Because they have affected themselves with the quality of enemy *pro hac vice*; and such is the logic and such the language of the prize authorities. There never was a law authorizing maritime capture that ever authorized anything but the capture of enemy ships and enemy property. There never was an act that authorized the capture of neutral ships for breaking blockade. The prize

Act, the capture law, all say, "seize the enemy's ships and goods." Well, we always seize neutrals. Therefore it is in the quality of enemy property that neutral vessels are to be condemned for breach of blockade and for carrying contraband; and, so far from breaking blockade and contraband standing better than direct enemy property in these controversies, there is not a footing to go against neutrals for contraband or for the breach of blockade, unless the doctrine of enemy property is established. Will neutral nations submit, as they all have submitted, to a law of nations which prevents them from carrying on commerce between blockaded ports and their own countries, if our ships are permitted to carry on such commerce from our ports? What was the case of the *Francisca*? The Russian blockade was excluded, as against neutrals, because England had reserved the right to carry in commerce of her own, for her own convenience, for a period of ninety days. The neutrals submit wholly on the ground that you have stopped commercial intercourse of all kinds by the laws of war. They say, "you had a right to do it toward your enemy. If we undertake to run against you, we become your enemy *pro hac vice* and fall within the same condemnation. But if you have no condemnation for the enemy, you can have none for us." If a Boston ship can carry goods into Charleston, then an English ship can. And if an English ship can be seized for doing it, and sentenced, a Boston ship cannot be seized for doing it and released. This doctrine, that you may take the Boston ship and turn it aside, and take the English ship and confiscate it, is a doctrine which the neutral powers would not submit to.

Now, this is the proposition from Halleck's international law, page 726:

"As a general rule all property belonging to the enemy found afloat on the high seas, and all property now afloat, belonging to subjects of neutrals or allies who conduct

themselves as belligerents, may be lawfully captured. All property condemned is, by fiction or rather by intendment of law, the property of enemies—that is, of persons to be so considered in the particular transaction. Hence prize acts and laws of capture with reference to enemies' property, are construed to include that of subjects of neutrals and allies who, in the particular transaction, are to be regarded as enemies."

Now, about breach of blockade. It is not any fault in an enemy to run a blockade. An enemy's running a blockade does not expose him to confiscation. He, as an enemy, is exposed to confiscation because he is an enemy, whenever you may catch him or how, but not because he has run the blockade. This is the decision in the case of the *Francisca*. An enemy's ship commits no offence against the law of nations by attempting to elude a hostile squadron and enter a blockaded port. She has a perfect right to do so if she can. She is already subject to seizure in another character, but she does not incur any penalty by breach of blockade.

Therefore, you see that, from the one hand and the other, these neutrals, who, my learned friend Mr. Lord thinks, must have to take care of themselves while he is saving the actual enemy, come into the matter only because they turn themselves into enemies by doing things which are offences for them. The enemy is an enemy in his own quality, not from any offence he commits, but of his predicament—if I may use a phrase to which some objection is made.

Now, it is said that there are various obligations, in justice, in duty, and in consistency with the principles of jurisprudence, in touching the commerce, in the shape of the ships and cargoes, of private owners who are loyal citizens and yet are residents of a part of the rebel territory. Now, let us understand that matter. It may or may not have been a necessary or useful thing for this Government, in undertaking to suppress the rebellion, to seize the *Crenshaw*, the



Hiawatha, the Brigida or the Amy Warwick. It may be quite true that the rebellion might be suppressed without doing that. But that it was a wise thing to attempt to cut off the inexhaustible supplies from the rebellion which it would require from foreign nations, by drawing a line of blockade and suppressing the commerce of neutrals and of the rebellion, nobody can doubt. That it was just as competent as it was to draw a line across the country—for there was no municipal law for that—there can be no doubt. But the truth is this, if the Court please:—You do not war against private property on sea any more than you do on land, in the true theory of the matter. You do undertake to reduce and destroy the commerce which belongs to the enemy's country, as a part of its growth, its strength, its supplies, its energies, its revenues, its resources. That is what you undertake to do. Now, every ship is the ship of some private owner; but you cannot touch the commerce of the enemy as such, unless you touch the particular ships which belong to private persons. When you invade an enemy's country you advance through his territory to reduce his strength and cut off his resources; but every rood of land which you occupy by your military movements is private property. You do not confine yourself to seizing the public places in the cities or the public highways in the country. You cannot encroach upon and occupy and reduce the territorial strength of the enemy except by encroaching upon and possessing and appropriating and applying, and using, according to the laws of war, the acres which belong to particular owners.

Now, the law of war, when you occupy private property on land, is one thing, and the law of war when you capture property at sea is another. They are both laws of war. They have their own reasons. It is not necessary to enlighten or defend them. The general proposition in regard to the land is that you keep it for military purposes, in the

largest sense, and that you can appropriate it so as to have the usufruct of it during the possession which war gives you. But what is the law of nations and of war in regard to ships? It is this: The only way they can be taken from the enemy's commerce is, either to destroy them at sea or elsewhere, or to preserve them as part of the property of the world and to change the title from the enemy to yourself. You do not pile up his ships in your harbors to be restored to him after the war by the *jus post dominium*. You do not destroy them. That is not permitted, from the danger to neutral property by the execution without examination.

You are then proceeding here to suppress the enemy's commerce. Was that a judicious object for the President and the political authorities of the country to effect? We will not debate that here. Here is not the place to debate it. There was the place to debate it. Could any man in his senses suppose that in execution of these powers of war, out of a commerce so limited in the possession of ships on the part of the South as we know it to be, there would have been brought with the Registers of the Prize Courts of the country forty million dollars' worth of property, almost all of it, I agree, neutral property, British, French and Mexican property, and not even a cry of faultfinding from these great nations?

Now, if we have found that the application of the law of war is submitted to by neutral nations, is recognized, and has, without recourse and without restitution, brought into our registers this quantity of commerce, what would the commerce have been which would have flowed in from all parts of the earth, feeding the failing revenues and exhausted resources of this rebellion, if we had not applied the law of war? Will commerce keep away under my learned friends' peace blockade and *monitor malis imposuit* doctrine of stopping the trade and returning the ships? Not a boat of this forty million dollars' worth would have come within the clutches of your war power, and the whole strength and aid

of foreign nations would have supplied this rebellion not only with the resources which their commerce gave them, but with the alliances and the war which must have sprung up between this country and them.

Now, if the Court please, we do not sit in judgment on the President and his councils. We show you that he has attempted and undertaken to do this. We show you the circumstances under which it has been done, and we show you the measure of its practical consequences.

Now, I agree that when my learned friend exclaims "Shall we not only be asked to concede these proceedings against loyal citizens in the Southern States but to say that it is just for a parental Government to execute this sequestration of the hard earnings of an honest and loyal citizen allured under the stress of a rebellion which he opposes with his will?" my learned friend commits the common error of confounding what is lawful and just as an end with what is lawful and just as a means. Shall I be told that it is the dictate of parental love to mutilate the warm, living body of his child? As an end, nothing more cruel and more wicked. But if it be the surgeon's knife which amputates the limb, to save the child's life, then, as a means, it is not only allowable, but it is the duty of the parent thus to apply the infliction. Nothing so bad as to confiscate the *Crenshaw*, the *Hiawatha*, or whatever ship of neutral or of loyal citizen, as an end. But as a means of carrying the protection of this Government to all the property, not only of these individuals there resident, but of all the loyal people of the South, and of saving from the madness of rebellion the rebels themselves, we are not, under the generalities of war, to be distracted from our purpose and duty by a shudder at the blood which trickles from the surgeon's knife.

Now this difficulty has been noticed in all similar controversies. When our revolutionary ancestors issued their resolution for maritime capture, they deprecated on the

face of it that it would bear hard on the subjects of England who were their friends, and they begged them to understand that it came from the generalities of war. When the British people undertook their movement, and the Crown of England suppressed the trade of these colonies, Lord Rockingham and other opponents protested against the general proceedings which confounded loyal subjects in America with those who were rebellious. But as great an authority as Lord Mansfield defended it, and on its true reason. He said: "It is the case put by the Swedish general, Gustavus Adolphus. 'My lads,' said he, 'do you see those men yonder? If you do not kill them they will kill you.'"

Is there any deeper or more solemn moment of duty than that? And shall a parental Government, which never inflicted injury in peace, be accused of cruelty—not against men, for, my learned friend says, we may shoot them all, not against the fixed property down South, for we may burn it all—he says—not against their ships, for we may sink them all—but the prodigious cruelty of changing property in tobacco and cigars? Why, my learned friend strips himself and this contest, of the laws of war which are its amenities, and must choose between the alternative of waging a feeble war or the alternative of waging a barbarous and cruel war, *bellum nefandum*. He vibrates between one and the other. If he had been brought into the councils of the Government he undoubtedly, in that situation and capacity, would have approved that, according to circumstances and means, the measures of the Government should be taken.

Now, if the Court please, we on the whole respectfully submit that the United States, a sovereign nation, prosecuting its right by force to suppress a domestic rebellion which uses the array and power of war against it, may rightfully exert all the powers and methods of war which the resources of its territory and its population furnish; that the Government, in doing this, had set on foot and was maintaining a maritime

blockade according to the law of nations; that in the prosecution of that right these captures were made, and the adjudication of the vessels and cargoes was made in the court below; that these measures were within the competency of the Government as the force of war; and that the sentences are conformed to that authority.

And now, if the Court please, this closes the case of the *Crenshaw* on the part of the Government, and with it the discussion of the important questions, juridical, political, governmental, and international, which have so long occupied the attention of the Court. As viewed by the Government, the inquiry as a judicial one is limited to the single topic of prize or no prize as presented on the record of each particular case and, behind that, to the single further question whether the political authorities of the Government, in making these captures, were executing the powers of war on reasons of duty and necessity sufficient for itself. On behalf of the claimants, the view presented is this, that this nation, this Government, is put to plead at this bar for the right and the power to use the full measure of its strength to uphold the Constitution and to preserve its existence. No other Government, no other nation, ever urged such a plea in any presence less august than of the assembly of the nations, before the Judge and lawgiver of all the earth, *magister et imperator omnium, Deus*, in the solemn arbitrament of war. If this momentous issue be really before you, it is the greatest question ever submitted to human hearing; and its very statement shows that perils limitless and inestimable hang upon your judgment, for if, in truth, the law of this Government is at variance with its power, in the very agony of this great struggle to preserve its existence, its fate can be neither uncertain nor remote. And who will wish to survive it?

If the Court please, to your abundant learning, to your wide judicial experience, to your comprehensive wisdom,

to the intimate and all-pervading sense of nationality, to your perpetual justice, your all-compelling duty, your all-inspiring loyalty, this question of the welfare, the safety, the permanence of the Republic, of which this Court is the grace and the defence, may well be committed.

IV  
ARGUMENT IN THE SUPREME COURT OF THE  
UNITED STATES IN *CHURCHILL AGAINST*  
*THE CITY OF UTICA*

TAXATION BY STATE OF THE STOCK OF  
NATIONAL BANKS

NOTE

The history of legislation and judicial decisions affecting the question of taxation of banks (both State and National) prior to the argument of this and similar cases is briefly as follows:

In 1863, Congress passed an Act, providing for the organization of banks under the Federal authority and control. This Act was superseded in 1864, by an Act passed in June of that year, which contained additional provisions of material importance to the questions raised in the various bank tax cases. Before the passage of either of these National Bank Acts, Congress had enacted, February, 1862, that the United States stock and bonds, whether held by individuals or corporations, should be exempt from taxation by or under State authority. This enactment was little more than legislative expression of previous judicial interpretation and decision by the Supreme Court in the leading case of *McCulloch vs. Maryland* and cognate cases, and of the doctrines there laid down by Chief Justice Marshall, asserting the supremacy of the powers of the General Government under the Constitution and freedom of the National credit from State interference or impairment.

In February, 1863, two cases came before the Supreme Court involving the question whether the Tax Commissioners of New York City could lawfully impose a tax upon that part of the property of banks, organized under State authority (State Banks) that consisted of United States securities (*People ex rel Bank of Commerce vs. Commissioners of Taxes*, 2 Black, 620 and *People ex rel the Bank of the Commonwealth vs. Commissioners of Taxes*, 2 Black 635). In the Bank of Commerce case the New York Court of

Appeals had made a distinction between those United States securities that had been acquired by the bank prior to the Act of Congress of February, 1862, above referred to, and those acquired since the passage of that Act, holding that by force of that Act United States Securities acquired since its passage were exempt, but otherwise not. The Supreme Court rendered its decision March 10, 1863, reversing the New York Courts and holding, on the doctrines of *McCulloch vs. Maryland*, that all United States securities owned as the property of the banks were exempt from taxation by the State and should be deducted from the aggregate property of the banks, in arriving at the property lawfully taxable under State authority. Under the law of New York as it then stood the method of subjecting corporations to taxation provided that the capital stock of every Company "shall be *assessed at its actual value*, and taxed in the same manner as the other personal and real estate of the county."

Immediately upon the announcement of these decisions and, no doubt, as a direct consequence, the New York Legislature passed an Act varying the method of taxing Banking Associations and provided that "All banks, banking associations, etc., shall be liable to taxation on a *valuation equal to the amount of their capital stock paid in, or secured to be paid in* and their surplus earnings etc., in the manner now provided by law." It was supposed by the legislators that they had thus found a method of accomplishing much the same result, that would not be obnoxious to the Supreme Court decisions. As by this method no examination and appraisal of the actual assets of banks need be made to arrive at a basis of taxation, it might be construed as not to impose a tax upon those assets. But the United States Supreme Court in the Bank Tax Case (2 Wallace 200), which was argued in January, 1865, disposed of this legislation of New York as being equally repugnant as the former, holding that taxation on a valuation equal to the amount of capital stock paid in was taxation of the property in which the capital stock was invested, and that in so far as that property consisted of United States securities, the attempt to impose a tax by the State Law was unconstitutional and void, again reversing the New York Court of Appeals.

But the efforts of the State to bring within the scope and exer-



cise of its taxing power the large amount of property invested in the banks, though the investment itself was thus protected from any direct imposition by State authority, soon found an indirect means of accomplishing substantially the result which, through direct interference by the State, The Federal Constitution had prohibited.

The National Bank Act of June, 1864, provided for a tax by the Federal Government upon the circulation and deposits and then proceeded as follows: "Provided, that nothing in this Act shall be construed to prevent all the shares in any of the said Associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such Bank is located and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State; provided, further, that the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this Act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located; provided, also, that nothing in this Act shall exempt the real estate of associations from either state, county or municipal taxes to the same extent, according to its value, as other real estate is taxed."

Shortly after the decision of the Bank Tax Case, and in March 1865, the New York legislature passed an Act, called an enabling act, by which a method was provided whereby banks organized under state laws could avail themselves of the provisions of the National Bank Act and transact their business under Federal rather than State control. Under Section 10 of this Act, "All the shares in any of the said banking associations organized under the Act of Congress, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate or corporation, in the assessment of taxes in the town or ward where such banking association is located, and not elsewhere, whether the holder thereof reside in such town or ward or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this state: Provided that the tax so imposed on such shares shall not exceed the par

value thereof; and provided further that the real estate of such associations shall be subject to state, county or municipal taxes to the same extent, according to the value, as other real estate is taxed."

Upon this state of the law taxes were imposed on the shares of National Bank Stock in the hands of individuals, at a full valuation, though the entire capital stock of the banks was invested in and represented by United States securities, with the exception, of course, of the real estate owned by the respective banks. The case of *Churchill against the City of Utica* was argued at the same time as *Van Allen vs. The Assessors*, 3 Wallace, 573, and another case, all of which involved the legality of the tax. The Court decided that the tax was illegal, but the decision was on the ground that the law of New York was repugnant to the Act of Congress in that it made no such limitation as the Act of Congress required, viz., "that the tax so imposed under the laws of any state upon the shares of the associations authorized by this Act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located." The State banks were taxed on their capital and under the ruling of the Supreme Court if the capital was in United States securities it was exempt; thus a discrimination was made against the National Banks and in favor of the State Banks. But, as the Court said: "This is an unimportant question as the defect can be remedied by the State Legislature."

The important question discussed in the argument and in the opinion of the Court and in the dissenting opinion, was whether the tax on the shares was not in effect a tax on the capital of the bank and, therefore, under prior decisions, so far as the capital of the bank was invested in United States securities, invalid. While this discussion was not necessary for the decision of the particular cases before the Court and in that sense was extra judicial, still the Court intended by this decision to settle this important point. The cases were argued at great length on January 31, February 1, 2 and 5, 1866. Associated with Mr. Evarts on the argument were C. B. Sedgwick, John H. Reynolds and Lyman Tremain. They were opposed by Francis Kernan and Amasa J. Parker. The Court decided, Mr. Justice Nelson delivering the opinion, that

a tax upon the shares of National Bank Stock was not repugnant to the constitutional exemption. From this decision the Chief Justice and Justices Swayne and Wayne dissented in an opinion by the Chief Justice.

In the face of this opinion of the Court, however, Mr. Evarts, in a professional opinion, advised the submission of the question to the Supreme Court again in cases where it would be essential to the decision to pass on the question. He expressed great confidence that the Court would finally adopt the reasoning of the Chief Justice and modify the extra judicial *dicta* pronounced by the Court in this case. In this expectation he was disappointed, for in December, 1866, eleven cases came before the Supreme Court involving this question in the argument of which Mr. Evarts took part. The Court treated the cases in a somewhat summary fashion, reiterating the decision in *Van Allen vs. the Assessors*, and *Churchill vs. Utica*, and adhering to the doctrines there laid down. There was also the same dissentient vote. (*People ex rel Duer against Commissioners of Taxes*, 4 Wallace, 244.)

### ARGUMENT

*May it please the Court:* I cannot think that the learned counsel, on the one side or the other, who have addressed the Court in this discussion, which it is permitted to me now to close, have at all over-rated the importance of the subject presented to your Honors. As a pecuniary interest, it is probably as large as ever came under your cognizance,—larger than, in the course of jurisprudence, has ever been submitted to any other court,—for, if looked at only in the measure of an annual tax to be laid by the various States upon the whole mass of property of these national banks, it comes to an enormous value; and, regarded as a rule, not for a year, but for the continual course of taxation, the proportions swell to still larger dimensions. So, too, in the extent of the application of your rule to be laid down in this case, which, though coming from the State of New York, yet, since that State is under the Constitution and under the laws of the United

States, must be substantially of the same character and have the same effects in all the States of the Union, the magnitude of all the interests is again presented as most serious. But while I thus agree in the gravity of the issues from the pecuniary interests at stake, I must think that some of the topics, insisted upon by our learned opponents as great elements in the importance of this question, were misconceived. The question whether such a great mass of property should be withdrawn from the funds accessible to the taxation of the States, which presented itself to the learned court that decided this cause in the State of New York, so that, somewhat beyond the bounds of ordinary judicial decorum, the learned Judge spoke of it as "frightful," and which, in the arguments of my learned opponents, has been brought to your notice in various tones of alarm and lament, is really not a topic for insisting upon the importance of this question. Whatever there is to disturb the equanimity of a court in that subject has already been disposed of by your Honors in the previous decisions, which have withdrawn absolutely, and under any form of property or ownership, the securities of the Federal Government known as the "public debt." This matter of the three or four hundred millions of bank stock, which we are considering, is not the cause or the occasion of the subtraction of these funds from State taxation. It is as investments in the securities of the Federal Government that these stocks are presented to your Honors as entitled to the immunity which belongs to these securities; and it is under decisions of this Court, which have made \$3,000,000,000 of Federal debt not subject to State taxation, that this derangement of the funds, of the property, which, on one side or the other, is to bear the burdens of our double government, is affected.

For the like reason, there is as little foundation, on an accurate attention to the subject, for the suggestion of the impropriety of the want of uniformity which would be produced among the citizens and in respect to property, if these

investments, these bank capitals, these bank operations, should be withdrawn from the whole support of the State Governments under which they are protected in common with the whole mass of property of the same description,—that is, the mass of personal property,—and for the statement that this gives great magnitude to the interests presented to you, as if it were a question whether this mass of property, now before you, should escape taxation or not. That is not the question. It has been suggested to you already by my learned associates that, under the taxation of the National Government, as prescribed in the frame and as a part of the bill creating these banks, they are made to pay, in the support of our common burdens, a very large measure of taxation, amounting to from two and a half to three per cent. in the average upon their whole capital, and that they thus pay from ten to twelve millions of dollars annually towards the support of the Federal Government.

At a time when practically we paid no taxes to the Federal Government, and the States had, undisturbed, the whole area of the real and personal property of the citizens of the United States by which to support their own institutions, a subtraction from the State Governments of a fund of taxation was equivalent to a withdrawal of it from contribution to the public burdens in any direct form. But now that we bear the burdens of taxation in our property in support of both the Federal Government and our State Governments, it is apparent that the suggestion, that the withdrawal of property from the legitimate exercise of the power of taxation by the States is relieving it from the payment of taxes, no longer has support in the fact. It becomes, therefore, as respects the burdens which the citizens of the United States and the citizens of the States, both being the same persons, are to bear, a question merely of the prudence, wisdom, and policy of the adjustment of taxes; for just so far as these banks contribute to Federal taxation, just so far they relieve

all the other property of the citizens of the different States from their contributions to the burden of Federal taxation. If it be true that they no longer are computed in the mass of property that shares the burdens of State taxation, nevertheless the citizens of the States, in their other property, feel the contribution of these national banks to the needs of the National Government, just as distinctly and just as directly as they would, if they contributed to the support of the State Governments. We are, therefore, relieved from both of these elements of difficulty and these disturbances in respect to the judgment of the court, so loudly insisted upon. If the present rate of taxation does not exact from this kind of property its full share of the burdens which it should be called upon to bear, then the Federal Government, the common master of all those institutions in all portions of the country, acting in the general interest, but regarding also the private interest of the citizens of all the States, may increase the taxation; so that, instead of contributing ten or twelve millions of dollars as they now do, by enlarged rates they may be made to contribute twenty or twenty-four millions of dollars. That is wholly a question of policy and wisdom in the taxing power.

Your Honors will thus see that all these considerations really do not touch the burdens of the citizens, but only the question what, in the complex system of our government, which now is required, both in its general control and in its separate State jurisdiction, to demand taxes from the citizens, is the proper and beneficial adjustment for us, in our capacity of citizens of the State and citizens of the United States.

Nor am I at all disposed to dissemble or disguise the difficulties of the discussion. If they seem to me less formidable than the zeal and ability of my learned opponents, in the interests of their clients, have represented in urging them upon the Court, yet the respect due to the unanimous, ad-

verse opinion of the highest court of the State of New York, expressed in the judgment of one of the most distinguished Judges that the State has produced, who now, by voluntary retirement, has closed one of the most honorable judicial careers that our history can show; the great *dictum* (as it is called) of Chief Justice Marshall, and the carefully weighed opinion of Mr. Webster, speaking always as one having authority, would admonish me of the rashness of my judgment. After all the difficulties, I apprehend that a thorough examination of the case will show, that, though the question comes here under the appellate jurisdiction of this Court, under the 25th section of the Judiciary Act, and though the subjects of discussion here, and the decision appealed from and to be reviewed here, do touch the construction of the Constitution and the laws of the United States, and the great constitutional conflict between the powers of the General Government on the one hand, and the rights and jurisdiction of the States on the other hand, yet all these questions, belonging to that high region of jurisprudence, have been really disposed of by the previous judgments of this Court; and the limit of the discussion, which, on the presentation of the case and your Honors' scrutiny of it, will prove to be needed for its determination, will be found to fall quite short of this elevated region, and really will turn upon questions of corporation law, as to what the relations of shareholders are, in the just idea of the constitution of a corporation, to the property and franchise, which, as an aggregate, are undoubtedly represented by the corporation itself. Since, then, it turns upon this question, what the relations of shareholders are to the property and franchise of a corporation, I shall consider whether or not the previous decisions of this Court have disposed of the question already, by its adjudications on the capital and the franchises of corporations; or whether, not having thus been absolutely covered by the previous decisions, the relation of shareholders

to a corporation is such as to require their inclusion within the principles that this Court has already laid down, in regard to the aggregate property and franchise; or, if this is not the case, whether a discrimination can be made, which shall find a place for it as new and separate property in the hands of shareholders, to be unaffected by the rules established in reference to the aggregate property.

Now, if the Court please, I have but a word to say in regard to the particular circumstances of the case in which I especially speak; for the question to be discussed in it is the same as in the other cases, and is substantially the same question, I imagine, that must come up from the different States, whenever attempts shall be made to exercise the right of State taxation on this subject matter. This Bank of Utica was constituted as a National Bank under the Act of 1863, and its capital was wholly invested in public securities of the United States that were issued before the 1st day of June, 1864,—a date only important, since it distinguishes those securities as being previous to the Banking Act of 1864,—in which latter Banking Act, for the first time, appears the clause cited from the 41st section, which gives a license or permission for the taxation of shares. Whatever, then, there may be in any differences in this respect, as has been hinted at in the judgment of the Court below, this Bank occupies the most favorable position; for its securities were taken by it, as investments, while there was the open and general pledge of the public faith, that they, protected by the National arm, were wholly free from State taxation. And the bank, organizing and acquiring these securities under such circumstances, if there be much for judicial consideration in what has been adverted to more or less in the argument (to wit, the question of a breach of faith in the Government, in allowing taxation by permission of section 41 of the Act of 1864) is within the most favorable consideration in that respect. But, I confess, I cannot see



that the correction of the alleged breach of faith on the part of the Government, if it has been shown in any degree,—I do not think it has been,—could be made by a judicial determination of this Court. Undoubtedly we do press it, and properly, as an argument of much force, tending to the proper construction of section 41 and the license there given, that, in the view contended for by our learned opponents, a breach of faith might be involved; whereas, in the construction which we suppose it properly bears, no such imputation is admissible.

If the Court please, this plaintiff in error, owning fifty shares in this bank, of the par value of five thousand dollars, has been rated thereon as a tax-payer under the laws of the State of New York, and is compelled thus far, by the judgment of the Courts of our State, and, unless your Honors shall reverse their decision, will be finally compelled to pay a tax, at whatever the rate of taxation is in the local community where this bank is placed, upon the par value of those shares. All the other stockholders are exposed to the same application of law, and, under this decision, the united stockholders are to pay a rate of taxation under the jurisdiction of the State upon what is equivalent, in their shares taken together, to the capital of the bank. In other words, \$200,000 being the capital of this bank—a National Bank—and being wholly invested in Federal securities, that capital is, by the form of assessing and collecting a due proportion of the tax on it from each shareholder, made to produce to the State of New York precisely the same amount of taxation, as if the same rate had been laid upon the capital of the bank, and it is made to affect the actual beneficial value of the shares, and the receipts and profits of the shareholders, precisely in the same manner, and to the same effect and measure, as if the tax had been laid upon the aggregate capital. I think, in the whole course of this discussion, your Honors have not

heard from our learned opponents any contradiction of that proposition: that this form and manner of taxation produces, as its fruit to the State, precisely the same amount, as the same rate of taxation upon the aggregate capital in the hands of the bank; and that it produces the same effect in diminishing the value of the capital stock, by diminishing the profits of that capital stock, laid in the form now proposed, that it would produce, if it were laid upon the aggregate capital, and upon the corporation as the taxable person.

These matters of fact being thus clearly ascertained, free from dispute, we need next to look accurately and attentively to what are the premises concerning the taxability of the corporations themselves, having their capital in such investments, from which we are to start upon the only inquiry left for discussion in this Court, whether the stock, as an aggregate, and the franchise, as a part of the value in the hands of the corporation, and the corporation, as a person subject to taxation, being exempt from this tax, this rate, this payment to the State of New York, the shareholders are subject to all from which the corporation itself is free.

I think that, on the second page of my brief, I have accurately stated the result of the determinations of this Court, both on this topic, as it relates to the investment in United States securities, and to the corporation, as a national institution within the protection of the Constitution, operating as an agency and means employed by the Government; and I say that it is settled by adjudged cases in this Court, that no tax can be imposed, by the laws or authority of a State, upon the securities in which the capital of this bank was invested, nor upon any person or corporation standing in the relation of owner of such securities, nor by any measure of his or its property as including such securities. The cases are familiar to your Honors, and I will only read a word or two from the former bank-tax case in the Court of Appeals, to show that the principle is as thoroughly recog-

nized by that Court,—obeying the decision of this Court, which has corrected its former errors,—as it is by this Court itself. In that case, which is not reported as yet in any volume of our reports, but is the case which came up to this Court, and is reported here in 2 Wallace, Chief Judge Denio said:

“It must be considered a settled point, that the power of taxation residing in the State Governments does not embrace, as a possible subject, the securities of the public debt of the United States.”

Upon that clear recognition that the subject, the *res*, the investment, was absolutely protected against State taxation, his Honor, giving the opinion of the Court of Appeals in that case, went on to hold that, whenever the tax was laid, not upon the capital of the bank at its value to be ascertained by assessors, but upon the nominal or original capital of the bank, it was not a tax upon the Federal securities, although the whole of that capital was invested in those securities. That error this Court corrected by the decision in 2 Wallace; and now, more than ever, the Court of Appeals admits this principle, and submits to that application of the principle, but has found a means, in a decision and opinion in these cases, to say that, although Federal securities are not a possible subject of State taxation, yet that Federal securities, under the form of ownership which their relation to the shareholders of a national bank exhibits, can be made to pay precisely the same tax that they would, if they were a possible or real subject of State taxation.

The other immunity which we claim here, and concerning which it is important to know to what the determination, up to this point, of this Court has brought us, is the immunity of these banks in capital, in operations, and in franchises, from State taxation, not because of any form of investment of their property in Federal securities, but, in the absence of that investment, because of their mere character of Fed-

eral institutions. What, from this point of view, is their situation in regard to State taxation? Upon that point I apprehend this is a just postulate, not to be contested and not really contested by the arguments of the learned counsel:—that it is settled by adjudged cases in this Court, that this Bank, in its corporate capacity, is not subject to State taxation by the laws or under the authority of a State, upon its franchise, operations, or capital (aside from the question of investments in Federal securities), but that it is wholly exempt from such taxation, by reason of its relation to the Federal Government, as an agency or instrument of that Government in the exercise of its constitutional power. Without adverting or recalling your Honors' attention to the cases in your own Court, insisted upon so frequently and so familiar to you, I will, upon this point, only call your attention to the complete recognition of this proposition by the Court of Appeals. In the first Bank tax case—the one which was decided on appeal by this Court in 2 Black—a case reported in 23 New York Reports, Judge Denio gives this as the clear judgment of that Court upon the proposition:

“But when it had once been settled that the bank was a constitutional agency and instrument for the moneyed operations of the Government, it followed necessarily, as it seems to us, that it could no more be taxed by State authority, than the Treasury Department, the Mint, The Post Office, or the Army or Navy; and it was upon this ground that the Maryland Statute was held to be unconstitutional.”

And, too, his Honor, Judge Comstock, in giving a dissenting opinion in that case, in which he obtained the concurrence of this learned Court on the appeal to it, made these observations:

“As to all subjects over which the taxing power of a State extends, there are no limitations dependent on the power of its exercise. If we admit the right to tax this credit in any mode and to any extent, we must admit it in a different mode

and to a greater extent. There is no limit to the principle. The acknowledgement of the right in any degree involves a conflict between the Federal Union and the parts of which it is composed; but, as the Union is supreme in the exercise of all its powers, including the vital one of borrowing money, no authority can be constitutionally opposed to it, which confines the exercise of those powers. This is a principle which requires the absolute exemption of the National credit from State taxation."

Has the last proposition that I have mentioned been questioned, that this Bank, in its capital, in its operations and its franchise, was wholly exempt from State taxation? Has that been questioned in the decision of the Court below, or in the arguments here? I must say that, in the decision of the Court below, I do not think it is questioned, although there are some observations that go to support the point, that the decision with regard to the United States Bank stood upon surer grounds, in respect to the character of that institution, than the argument about these National Banks in respect to their character could stand; but, nevertheless, I understand that learned Court to place its decision wholly upon the proposition that this tax, not being constitutional if laid upon the capital of the Bank and its franchise in bulk, by reason of an exemption of both as an accredited agent of the Federal Government within its constitutional power, can, nevertheless, be assessed upon the shareholders. But one of the learned counsel who last addressed the Court in favor of the defendants, Judge Parker, in his brief, and orally, has somewhat questioned the fact that these Banks, in their aggregate and corporate interests, are exempt from State taxation. He has presented an analysis of the power of the United States Bank as we call it, and the powers and duties of these banks, and has intimated that the discrimination is wholly unfavorable to the position of these banks; yet, if your Honors please, it can hardly come to this, that he

here contends that these banks are not within the exemption which the principles laid down by this Court extended to the United States Bank; for to say that would be to say that these National Banks were not constitutional creations; because, as Chief Justice Marshall said in the discussions in the case of *McCulloch vs. The State of Maryland*, if the bank is not one of the means and agencies of the Federal Government, which, by mere force of that relation, comes to be protected from State taxation, then it has no lawful existence; "for who," says he, "can point out the right of the Government of the United States to establish a banking corporation, unless it be as a means, an agency and performing some of the functions of Government attributed to the National authority by the Federal Constitution?"

So I think we may start with this proposition; that these banks, both in respect to the investment and in respect to their corporate immunities, are absolutely protected against this very rating and assessment and taxation which has been enforced against the shareholders. The law of the State of New York, under which, during the last year, these taxes have been laid, and under which it is proposed to lay them in the future, to wit, the "Enabling Act," as it is called, which has been placed before your Honors, assumes to levy taxes "on all the shares" of the banks in the assessment of taxes "in the town or ward where such banking association is located and not elsewhere, whether the holder thereof reside in such town or ward or not"; and then it provides that, for the purpose of collecting such taxes, it shall be the duty of every banking association, organized under the Act of Congress, "to retain so much of any dividend or dividends, belonging to any shareholders, as shall be necessary to pay any taxes hereby authorized." Under that law, transferring taxation from the body corporate and its aggregate investments to the owners of proportionate shares of its corporate franchise, of its corporate investment, it has been held by

the Court of Appeals that, notwithstanding the principles which exempt the bank and which the Court of Appeals itself recognizes, the shareholders can be made to pay what comes to the same in regard to the State, and comes to the same in regard to their own pockets. This is supported by that Court upon one of two grounds or perhaps upon both: first, by the mere authority of the State, without asking leave or allowance from this Government; and, secondly, by the authority communicated or permitted by the proviso of the 41st section of the National Currency Act of June 3d, 1864.

Is it not, then, entirely true that there is but one question for discussion here, having, if you please, a twofold application, one, to the question of investment in Federal securities, and one to the corporate aggregate known as the National Bank; and that question is, whether what cannot be done to the bank as a whole, can be done, from the peculiar form of organization, to the property held by the shareholders; so that what the State loses by the immunity that this Court has thrown over the investment in the aggregate, is recovered by the State, with the full power of taxation over the same *res*, in a different form of approach and attack; that what this Court has decided is necessary, is essential, is vital to the public credit, in respect of the investment, that what this Court has decided is necessary, is essential, is vital to the corporate existence, for the public purposes of the Government of the United States, and so must be protected by the power of interpreting the Constitution lodged in this Court, and the authority of its mandate to be executed by the power of the nation, is, nevertheless, to be wrested from Federal control to the destruction and ruin of institutions, created to be preserved, to the injury and burden of the public credit, intended to be advanced, simply by the form of saying to the tax rater and the tax collector, "lay the tax, that you would have exacted from the corporation, distributively

upon the shareholders, and we escape from the Federal Constitution and the Supreme Court of the United States, by the form and manner of assessing and collecting," since there is, in the practice of the States, a well-known habit of levying taxes indifferently upon the aggregate or upon the shareholders, as convenience dictates, always recognizing that, whichever form they adopt, they tax the same thing, acquire their returns from the same persons, and receive into the Treasury the same results. Certainly there never was such a discomfiture of fact and substance, of constitutional power, and of the firm, strong reasoning of this Court, as would result, if this ingenious combination between the Legislature of a State and its officers for the assessment and collection of taxes can effect this result, and destroy what this Court has undertaken to preserve.

I will first consider, as most briefly and satisfactorily to be attended to, the question whether the State, in the taxation it insists upon against these shareholders, derives any authority from the 41st section of the Act of Congress of June 3, 1864, and I say unquestionably that it does not; and without any discussion of whether that section be, as Mr. Webster imagined it would not be, unconstitutional, and without examining the particular construction of that section, whether it be such as to allow these stocks, thus invested in Federal securities, to be taxed or not,—irrespective of that,—but supposing that the section communicates a license according to its terms, and that, if its terms were observed, this tax would be protected and allowable under it, I say that there is no credit nor power given to the State in this taxation from that section, simply for the reason that it has not observed the conditions. The conditions are, that, if the State taxes the shares of the national banks, it shall impose upon them no other nor higher rate of taxation than it imposes upon the general investment of personal property of the State; and, secondly, observing that, that it shall also



tax them at no other rate than it imposes specifically upon the shares of State banking institutions. It is undisputed here, that, under the laws of the State of New York, no rate nor tax whatever is laid upon the shares of State banking institutions. The statutes of the State of New York say that the shares of State banking institutions shall not be taxed to the shareholders, and they are not taxed.

What, then, is the taxation upon a State banking institution in the State of New York? It is a tax upon the aggregate capital of the bank, exacted from the corporation itself. Now, will my learned friends tell me that, although the State of New York does not lay any tax upon the shareholders of State banks, and so does not observe the condition of the 41st section of the Act of Congress, it does lay the same rate upon the capital of the bank in the hands of the corporation, and that that is equivalent to laying it on the shareholders? If they will only do that, they will relieve me from the need of any argument; for, if laying a tax on the capital is the same as laying it on the shares for the purposes of a State corporation, then laying it on the shares is the same as laying it on the capital of National Banks, and that is all that I have undertaken to prove. But even if they thus surrender the practical question to escape from a special difficulty, the actual state of the system of taxation and its enforcement in the State of New York would not relieve them, because, in regard to the tax rated and collected from the corporations created by State laws as the persons taxed, and taxed upon their aggregate capital, under the decisions of this Court, controlling and acted upon in the State of New York, it is required, that, before the capital of the State bank presents its aggregate for the rating of the tax and its payment, there should be a deduction from it of every dollar that is invested in Federal securities; so that, as a matter of fact, if, side by side with this National Bank in the city of Utica, there were a State bank, of the same capital of two hundred thousand

dollars, having that capital invested precisely as the capital of this National Bank is invested, in Federal securities, while, under the form of taxation laid and enforced by the State upon the banks which I represent, there would be paid a full rate upon the two hundred thousand dollars, distributed upon the shares, there would not be one dollar of tax laid or claimed against the State institution, that carried on business in the same street, under the authority of the State of New York. Therefore, put it on matter of form or put it on matter of substance, your State authority lays no taxation on State institutions situated precisely as this National institution is situated; and hence, when you seek authority by permission and license of the Act of Congress, the limitations and the conditions must of course be observed, and they wholly fail. I ask your Honors' attention to a very intelligent and well-considered opinion, given in our State, in which it has been held by a branch of the Supreme Court, that, conceding that the shares may be taxable for aught that the authority of the United States gives under the permission of the 41st section of the National Banking Act, yet, for the want of the observance of its conditions, the law against which we are now remonstrating and arguing is wholly invalid, because the State does not lay a tax. That learned Court says:

"The system of taxation adopted by the State, under the provision of the Revised Statutes, is, that the laws of the State provide for the taxing the capital of a State Bank, and the stockholder is not to be taxed, as an individual, upon his shares. Therefore there is no State law, making provision in any case for taxing the shareholders in State Banks for their shares. Consequently the shareholders of National banks, or State banks, are not liable to taxation in such shares."\*

\* *The People vs. The Town of Barton*, 29 Howard's New York Practice Reports, 371.

This your Honors will rest upon, as satisfactory proof that the system of taxation is such as I have stated; and the authority of that Court—indeed, I think no authority is needed for it—is, that, if the permission to tax by the State rests upon the 41st section, this tax cannot be sustained, for the reason that the conditions are not observed. I shall, therefore, for the rest, confine myself to asking what is the great and principle question of the case presented to the Court, to wit, the assumed power of the State of New York to levy taxes upon this fund and capital, by the form and means of taxing shareholders, when it cannot do it in any other way,—a power against the will of the Government, against the decisions of this Court, against any construction of the Constitution of the United States that would seek to inhibit it. But I ask attention, for one moment, to what I assume will be regarded, when a case shall properly arise for it, as the proper construction of this proviso. Your Honors will notice, that the 41st section provides for the taxation of these institutions by the National Government, and then goes on to say: .

*“Provided, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or body corporate, (from being included in the valuation of the personal property of such person or corporation) in the assessment of taxes, imposed by, or under State authority, at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of such State: provided further, That the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located.”*

I apprehend that no one can claim, that there is anything in this act that had relation to exemptions, except such as grew out of its creating these public institutions agencies of the Government. In other words, the exemption, created or inferable from this act, would be the exemption that belonged to these banks as agencies; and there is nothing in this act that has any connection with the exemption of the United States securities. When, therefore, you are construing this proviso, which is intended to save from the operation of an inferential exemption from this act, you must not carry your proviso or saving clause beyond the principal provision which it is designed to define, not to avoid. It means, then, that nothing in the nature of these institutions, as agencies or instruments of the authority of the United States under the Constitution, shall save them from taxation on their property, in the same way as other moneyed capital may be taxed by States; but it was under other laws of the United States that the immunity of the investment in Federal securities was claimable, and was created. The Congress of the United States, adopting and following the judgment of this Court, enacted, in the Statute of February 25, 1862, that the Federal securities, whether held by individuals, corporations, or associations, should be exempt from all taxation under State or municipal authority. It is, then, under that and similar statutes, that this form and application of immunity is derived; and this saving clause does not operate on that act. It merely means, "You may tax the investments in the corporate property made by these corporations, as you might do, if the immunity of Federal agency was not over them." When you come to the question, whether, under cover of this saving clause against a particular effect of the statute, you have opened to the States taxation upon Federal securities owned by these corporations, when you have closed it against taxation in any and every other form of ownership, you are proposing to give to this section a

force which it never, in legislative intent, could have been designed to have, and which, on any sound principle of construction, it cannot bear. Its meaning, so far as the question of these investments by these banks in the Federal securities goes, would be to put them, in that respect, on the same footing with an individual having his moneyed capital invested in that manner, and on the same footing in which a State corporation, having its capital invested in these securities, would stand. Is it to be said, that, when all the moneyed capital in the hands of individuals and State corporations, that is invested in the United States securities, is protected against taxation by the State, as soon as one of the National banks invests in United States securities, it has opened and exposed to taxation those very securities, which are exempt by the law of 1862, by force of a proviso which says that the banking act shall not be construed to exempt the National banks from State taxation?

I think, therefore, that, on any construction of that section (even if, by conformity of the State to the rate of taxation on State bank shares that it has laid on national bank shares, the permission of that section could be invoked in favor of this tax), these three banks would still be exempt from the payment of any tax on that portion of their capital which was invested in the United States securities, for the reason that I have stated to the Court. But if this proviso is not before the Court for adjudication because it has not been followed by the State, it will be for your Honors to consider how far that point can be disposed of in your judgment.

It really seems as if we were reduced to but a very narrow region of reasoning, if we are so far advanced successfully. It must come to this, that the State, having no power (for this law gives none) to pass the act which it has actually passed,—no power derived from the Federal government,—assumes a right to tax these investments and tax this capital

in the form of shares, although it cannot tax them, as has been so often urged, in the aggregate or corporate capacity. The argument can rest upon nothing but this: it asserts a distinction between the capital stock of the corporation in the aggregate, and all the shares of such capital stock as subjects of taxation; such a distinction between these two descriptions of property (I say two descriptions of the same thing), that a tax levied upon the shares is constitutional, although a tax levied upon the aggregate is unconstitutional. It asserts another distinction, a distinction between the corporation and the shareholders or members of the corporation; for are not shareholders members of the corporation? Is not the corporation composed of members? When all the members of a corporation cease to exist does not the corporation cease? It asserts a distinction between the corporation and the shareholders or members of the corporation, as taxable persons, to the effect that a tax upon, or in respect of, the same property, distributed upon the corporate members, is constitutional, though, laid upon the corporate body, it is unconstitutional. I have looked in vain through the briefs and listened in vain to the arguments of my learned friends, to find any other ground for them to discriminate for the constitutionality of the tax on the shareholders, admitting the unconstitutionality of the tax on the corporation and its property, except in one or the other of these two forms.

I will take up first the question of investments. I say that the proposition, that the investment of a corporation in Federal securities of the whole or a part of its capital stock cannot be made subject to State taxation, laid upon its capital stock, and yet that the same investments may be subjected to State taxation, laid upon the divisions or parts of its capital stock known as shares, cannot be maintained. The first reason I assign for this is, because the attempted distinction overlooks the legal character and grounds of the exemption. The exemption is of the *res*, of the subject of

the securities. It has no relation to any form of enjoyment or ownership of them. It says that this subject of property shall not yield a tax, and the exemption is laid for the sake of the investment, and not from partiality to any owner, or any form of ownership. It is that the thing itself may be better, that it may be worthier, that it may be more valuable, the occasions and the duties of the Federal Government requiring that it should be made so and kept so, and it has no more concern with any form of ownership, as matter of policy or as matter of personal protection, than it has with the remotest considerations from the topic. It is that this thing shall have the virtue in it of being worthier than other property, because it is exempted from State taxation. When you are talking about the different relations which the shareholder and the corporation have to the corporate property, and the different relations that the corporation and the shareholders have to what are called shares, you are talking of what is interesting and important in some views of the law; but you are talking of a subject that has no relation to this question,—whether, for the purposes of maintaining the exemption of this investment from taxation, the exemption is to attend it in every form of substantial ownership; for it is only through forms of substantial ownership that the worthiness of the thing is to be preserved. There is no such separation possible as leaving the securities as worthy as before, but disparaging their purchase, because in a certain form they cannot be owned without being taxable. But it also overlooks the legal ground and character of taxation. Taxation pertains to the subject, the *res*, and has nothing to do with ownership and cares nothing about it. It is wholly immaterial to the taxing power what the form of ownership may be; it is the value that it is after. In whatever owner it finds that value, the taxing power will extract it by proceeding *in rem*, if you please, and not care who is the owner; or, if convenient, it collects the tax through the med-

ium of the owner, and the coercion is only to make him pay it. The taxing power, in pursuing its method of taxing, is no respecter of persons or forms or title. It is the thing it looks to; and when land is the subject of taxation, as we all know, the exaction of the tax or enforcement of it is wholly unconcerned with titles, incumbrances, liens, divisions of equity and at law in the enjoyment of the owner. It taxes the property, and sells it by an absolute and paramount title, dealing with the thing itself. The relation is the same towards personal property, although there may not be occasion or opportunity to apply practically the same effect. I say, then, you overlook the nature of the distinction, when you say that the same thing is to be extracted from taxation in one form of enjoyment and not in another.

Now, suppose that a government, wishing to invite population or to improve the domestic habits of its people, establishes an arrangement promising freedom from taxation to all dwelling houses that should be built. The dwelling houses are built, the law being that dwelling houses shall be exempt from taxation. Can you tax the owner of a dwelling house on the rent he gets from his tenant? Is not that taxing his dwelling house? Is the promise performed, is the faith kept, when you say, "We do not tax your dwelling house, we do not tax you on the fee of your dwelling house, we tax you on the *rent* of your dwelling house"? You tax the dwelling house in one of the forms of its owner's enjoyment of it as property. Can you tax the tenant and say, "We tax you in proportion to the rent that you pay to your landlord"? That is taxing the dwelling house; that is taxing the house—the thing which has been procured by the public interests, upon the promise that it should not bear taxation. Is not the taxation of the occupation of the house, whether it be imposed upon the landlord or upon the tenant, a tax upon the house? Certainly it is. And this shows us that taxation and exemption, correlative terms, touch and



adhere to the subject, and have no concern with ownership, title, property, or enjoyment. All title, ownership, property, enjoyment, is lesser than, and is included in, the matter that is the subject of property, and that swallows up title, interests, legal and beneficial relations; and when, in the sense of taxation and the sense of exemption, the subject has been rescued from burdens, nobody can feel them. Has the subject been rescued, if anybody can feel the burden in consequence of the subject? Has the subject been saved from contribution, if anybody, in consequence of connection with the subject, has to contribute? Certainly not. You must find some other relation than that of ownership, whether it be legal or equitable, that you tax, or else you tax the property itself.

This, too, exalts the forms and phrases of the law above the law itself. The United States Government have thought it necessary to give to their securities this credit, and thus to send them out into the whole nation and to the world. They have not broken their faith by any legislation. They have not broken their faith by any construction of legislation. They have not broken their faith by any adjudication of this court up to this time, whatever the Court of New York may have thought. Twice corrected by this Court on these subjects, now, with legal effrontery, not personal, that learned Court comes here and says:

“You have told us over and over again that we cannot tax United States securities; cannot tax them in the measure of anybody’s property; cannot tax them in the form of value in property at a nominal, and not a real, standard; but we have found one shape in which we can tax them in spite of you,—if a national bank owns them, we can make the shareholders pay the tax.”

This, I say, stultifies the acts of Congress and nullifies the decisions of this Court on that subject. How do you get a tax on these securities and make a shareholder in a

bank pay it? The whole capital of the bank is free. That is admitted. It is free by its own nature, by its being invested in these securities. It is free, because it has been decided that the States cannot tax this capital. That is all admitted. But it is said, "We tax the shareholders." They must tax the shareholders upon this property, this value, either because they do not own it, or because they do. You may tax it because they do not own it, as you would tax A on property of B, and tell him that, since B is not able to pay your tax, you tax A on his property. That, however, is not to be imputed. Then you tax the shareholders because they do own this property, because they have some ownership in this investment; and yet the brief of my learned opponents admits that the owner of United States securities cannot be taxed by the States for them.

Let us look at that a little more closely. Suppose that A holds, as trustee, \$100,000 worth of the securities of the United States, and is asked to give an account of his taxable property in his relation as trustee, and he states that the trust fund is all invested in United States securities. That exempts him from taxation. Then the tax-gatherer hunts up the *cestui que* trust and says, "What have you?" The answer is, "My only income is from a trust fund in the hands of A, my trustee; he is the man to pay the tax." "Oh, we cannot tax that, because he holds United States securities; what is your beneficial property?" "It is \$100,000." "Then we will tax you." "Well, but," the *cestui que* trust says, "I do not own the property; A is the legal owner, my trustee; why not tax him, if anybody is to be taxed? I do not own the property; if anybody is to pay the tax, the owner, the trustee, is to pay." "No," says the tax-gatherer, "we cannot tax the owner; he is exempt on account of the investment; but we tax you, as the *cestui que* trust, because you are the beneficial owner and not the legal owner, and

you shall pay the tax." I imagine that, if the State should pursue that method, this Court would correct it and say, "that this \$100,000, in its legal estate, in its equitable estate, in its legal control, in its beneficial enjoyment, is free from taxation." Yet no man can distinguish between a legal ownership in United States securities, and an ownership in those same securities lodged in a form and organization by which twenty people part with their legal control over them, and turn themselves into the enjoyment of them as beneficial or equitable owners. Take this case: twenty men meet together, with \$5,000 in Federal securities each as private property, and put them in bodily and make the capital of \$100,000, invested in them, of a bank organized under this act, and come out what?—Organized into a bank, with their Federal securities owned by the bank, of which they are the owners, of which they are the members, of which they are the stockholders, the legal institution holding the legal property. Has that transmutation made the securities taxable that were not taxable before, when the exemption adheres to the securities, and not, by name, to any form of ownership?

But, if your Honors please, the proposition that the corporations, created and performing their public functions as agencies of the Federal Government, cannot be taxed by the State on their capital, franchise, or operations, and yet that the shareholders, in respect of their membership and ownership of the corporate body, franchise, and capital, can be taxed, is self-repugnant and illusory; and, in connection with this point, let me look for a moment and briefly, though a subject inviting for illustration, upon the frame and scheme of the National Bank system, one of the most remarkable creations in the progress of this nation, one of the most essential means of carrying this nation through its late trials, and saving it from the disasters and convulsions which attend a restoration of peace in the financial circumstances of the nation and its citizens. What is it, and what

is the whole idea of it? What is the whole service of it? What is the whole genius of it? It is this: it is to call into the fiscal operations of the Government, in the execution of its powers and duties under the Constitution, the capital, the resources, the processes of private interest and business, and employ them as agencies and means in the public service. It is the connection of the special duty and function of the General Government with the living circulation of the great body of the nation, over which it is the Government. Government might have loan offices, loan agencies, sub-Treasuries, and multiply them in every village, and they would be a dead organization of the Government, mere functionaries; but, by this system, by a happy improvement upon everything we had ventured or imagined in our financial experience, the Government seized upon the living energies of the American people and made them, by their voluntary organizations, agents in the public service of the country, just as distinctly, just as usefully, as, in calling upon the citizens to enroll their persons in the military service of the country, you have, instead of a dead organization, a living body of citizen soldiers. This is what the bill did, and what it wanted to do, and what it successfully and wonderfully accomplished. That was the thing; it was the private persons, and the private interests, and the private processes, and the private energy of the people, that it wanted to unite in this public service. That was the substance, and the rest was nothing but form. It was to combine or organize the collective private capital and the resources of the nation under the well-known form of legal incorporation, as the most convenient, if not the necessary form of accomplishing public objects. Now, as I have said of an army, it is the array that constitutes the army. It is the power, it is the array, that you want; and the rest:—of organization, of articles of war, or arrangement of ranks and grades, and all the machinery of control, is for the array,

and not the array for it; and so it is the array under this organized banking system that is useful. It is the array of the private enterprise, capital, and business, that is wanted; and the corporate form, a well-known arrangement for managing property, is adopted, because it is suitable for this, just as it is for the purely private operations and affairs of life.

Upon this mere statement, which cannot be contravened, it is apparent that the instrumentality adopted by Congress for executing these powers of the Government, has for its essential element this associated capital and these personal exertions, and that the corporation is but the form of wielding and operating the capital. Then, as I have said, it is not the artificial person that is the object of the Government's care, or that is the principle or substance of its object. That is but a form, and as a form alone it is to be allowed to operate and to have its consequences. If immunity from State taxation be the prerogative and the necessity of these legal organizations, it is the immunity of the contributed capital and of the contributors that is needed. If the immunity is essential for the Government's purpose to maintain the corporation, it is essential for the Government's purpose that this immunity should rest upon those who are to contribute their capital and find their inducements to volunteer in this service of the Government; and any protection or immunity, that shall occupy itself and confine itself to the protection of the corporate capacity, and leave the individuals, the members, unprotected, would soon exhibit the fact that it is the members who make up the corporation, and not the corporation which secures its own masters and members. All the arguments which we have heard about the bank and the shareholders, that the bank holds its property by its own title, and that no shareholder has any title in it; that all the shareholders together cannot assign nor transfer nor convey any of its property, but that a share in a corporation is a new form of prop-

erty; and that it belongs to the shareholder, and that the corporation does not own that, and the corporation cannot sell that, cannot convey that—perfectly sound, as familiar as any other of the first elements of the law—insisted upon here to carry certain consequences, have no effect whatever on those consequences. As to the subject matter of this controversy, they can have no effect. Various definitions have been given about the relation of a shareholder to a corporation. My friends seemed to prefer that loosest connection, which makes the shareholder the holder of a *chose* in action or right of action against a corporation, the same as a creditor; and they pushed it so far as to say that they think, on the whole, that a creditor has a nearer and closer right to the property of a corporation than a shareholder has, because he will have to be first paid when the affairs of the corporation are closed; and the learned Court below has adopted that idea to some extent. These familiar doctrines are not in dispute here. It is for the very reason that a corporate organization has these consequences, that a corporate organization has been selected by Congress as the means of wielding this public operation that is essential to the service of the Government. It is for the very reason of these effects, that it has adopted it, to wit; that a form is provided in our law, whereby the various owners of property may combine to manage it in a common agency, having this great principle, that its identity shall be preserved, although individual owners may dispose of their interests; and that the public will, or major voice, or administrative delegation, shall govern the common property for the common good, instead of having it stand always on the individual right of every man to have his own will carried out. That is all there is to a corporation. You may talk about it forever; it is wholly a form, known in our law, whereby men may put their property together and keep it in that form of ownership and organi-

zation for purposes of convenience and nothing else; and nobody owns it but they, after they have done that. It is purely a short, elliptical expression to say that the corporation owns it. It is owned by the shareholders; it is owned by the owners of the property. As against each other, they have committed it and themselves to a form of organization, which permits of the disposition of the property and the maintenance of the title, with the advantages that I have named. But to say that there are two properties, to wit, \$200,000 of investment that belongs to the corporation, and another \$200,000 that belongs to the shareholders, is perfectly absurd. To say that this united ownership in a subject of property, when the subject of property is free from taxation, leaves the individual shareholders subject to taxation on their shares,—I mean when it is exempt from taxation by an authority stronger than that which undertakes to divert the form of taxation,—is simply saying that the paramount government is master of the question of the taxation of the property, and the State government is yet final master of the question, by being master of form and device. This Government is no master of the question whether this property shall be taxed, if the State Government is master of the question of any form or contrivance, which, by paltering about corporations and shareholders, and shares being personal property, individual property, and the corporation being aggregate property, can exact a tax from the property. Therefore I say, that no rule of law has ever asserted, and no refinements of argument can ever maintain, that the corporation has its capital invested in certain property, and the shareholders have their shares represented by other and different property. When the *res* cannot be taxed, I want you to find some other *res* than the shareholders, which can be taxed. Can the property of the corporation perish, and that of the shareholders survive? The rule of law is "*res perit domino*"; the owner loses prop-

erty when it is destroyed. The shareholders lose their property when the capital of the corporation is sunk. That we all know, and some of us have felt; and we never heard of such a distinction, as that the corporation had one property and we had another property; that the corporation could not be taxed on its, but we might on ours.

Now, put this question: suppose, as may be done unless there be some distinction in our States,—and there is not in the Constitution of New York or in the Constitution of most of the States,—that the ordinary rate of taxation is three per cent.; that is the rate in New York City on capital; three per cent. is laid on the aggregate capital of a bank, and three per cent. upon the shareholders, on the par value of their shares; in that case are two values taxed, or is it one value that is taxed twice? Does that property pay the usual rate of single taxation, three per cent., or does it pay six per cent? It pays \$12,000; \$6,000 exacted from the corporation and \$6,000 from the shareholders. Is that three per cent. on \$400,000, or is it six per cent on \$200,000? It is a question of one value as a subject of taxation. However they may be distributed on interests, they are really the different forms of owning the same thing. Suppose that a Government, interested to invite capital in favor of manufactures, declares that it will not tax the capital of manufacturing companies that shall be formed under it; and, having got them formed, it taxes the shareholders on their shares. It says, "We cannot tax the capital; we promised not to tax the capital; but we tax your shares." Would that be allowable? All of this illustrates, that it is form and arrangement of ownership in the same thing that is meant to be taxed in one form and cannot be taxed in another form, but still is the same thing; and that the exemption is not formal and modal, but is of the thing itself.

We are prepared now for a further proposition of general reasoning, which I am able to support also by the distinctest



and most explicit authority. If one of the States issues a charter to a corporation, with a clause in it exempting the capital stock from taxation for a limited term, and within that term lays a tax upon the shareholders, will not this Court correct that legislation as a breach of the clause of the Constitution against impairing the obligation of contracts? I submit that the premises of that question are the premises of this question. We have a provision of the Constitution of the United States that the obligation of contracts shall not be violated by the States; we have a State making an obligatory contract that it will not tax the bank, and it afterwards taxes the shareholders. Does it not thereby violate that contract? What are the premises of this question? The premises of this question are, that the Constitution of the United States protects this aggregate investment and the aggregate capital, franchise, and operations of these banks from State taxation, and the State taxes the shares; does that violate, or not, the constitutional protection? I submit that, to a legal mind, this question carries its own answer; and it is only from the peculiarity of the jurisdiction of this Court, under the Constitution of the United States, in relation to sovereign communities, that we are enabled to have, in the form of a lawsuit and a legal decision, a question that would usually be left to the discussions of public faith and the maintenance of the honor of a State. In the third volume of Howard's Reports, this whole subject is disposed of by the unanimous judgment of this Court. Having handed that case to my learned opponents before their argument, Judge Parker ventured to make some remark upon it by saying that it turned upon contract; and they conceded that, under this clause of the Constitution, if the State had bound itself not to tax the bank, it could not tax the shares. Now, with great respect to my learned friend, conceding that, he might as well concede, that, if the State of New York, under the

Constitution, cannot tax the bank, it cannot tax the shares; and no lawyer can draw a discrimination between the two cases. Now let us be sure that this case, of so grave consequences to the discussion before us, is as applicable as I have stated it. It is the case of *Gordon vs. The Appeal Tax Court*, 3 Howard, 133, an appeal from the Court of Appeals of the State of Maryland. I will read the section of exemption of the Maryland statute:

“That upon any of the aforesaid banks accepting of, and complying with, the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them.”

This is the phrase of the exemption; the State is pledged “not to impose any further tax or burden upon them, during the continuance of their charters under this act,” and that is all; there is not a word about stockholders there. The bank accepted this law, complied with its provisions, and some years afterwards a law was passed taxing the shareholders for their shares, as component parts of their general personal property. Let us see how counsel stated the question. On page 139 the counsel for the shareholder stated it thus:

“The tax of 1841 clashes with the exemption. It is laid on everything which constitutes the property of the bank, because, in a schedule, everything, even the franchise, goes to make up the aggregate value of the stock; and the tax is laid on the cash value of the stock. By the 17th section, the assessors are directed to value it at the market price. But the market price is governed by the value of all the different species of property held by the bank, including even the franchise, because a purchaser looks at all these when about to invest. It is impossible to separate that portion of the tax which falls upon the franchise, and, as the legislature has covered the whole, the entire tax must fall.”

The counter proposition, at pages 141 to 143, is precisely

what is laid down here that the bank could not be taxed; but this is not a taxation of the bank,—this is a taxation of the shares, as component parts of the property of the individual, in common with the other taxable property of the State, against which it has not precluded itself by a correlative obligation not to tax the bank. It was insisted upon there, as here, that the difference of title made the difference of substance; that the stock was personal property, transferable by and belonging to its owner; and that the stockholders do not own the property of the bank and cannot convey any title to it. In other words, we had the same disputable facts and law about the relations of stockholders and stock, capital and shares, that are insisted upon here as regards the modal administration of the *res* owned; and that was urged upon the Court as a reason for saying that a tax on the shareholders was not a violation of the contract not to tax the bank; but the answer of the Court was, “That is not the way to keep the contract you have made; the subject matter, the purpose, the object, the promise, the result, all make your promise cover the property in its beneficial, and not its formal ownership, and the promise is broken when you tax the shares of the bank”; and his Honor, Judge Wayne, delivering the unanimous opinion of the Court, put the subject on the same grounds; nay, its reasons and its phrases will answer for a decision of this cause. After that, a similar case arose before a very learned court in New Jersey, which is reported in 3 Zabriskie, 484. Chief Justice Green, a judicial authority well known to this Court, in giving the opinion of the Supreme Court of New Jersey, said:

“When an incorporated company is, by its charter, exempt from taxation, the stock of the company, in the hands of the stockholders, cannot be taxed. It represents, and is, the title to the property of the company, and is therefore included in the exemption of the charter.”

There the exemption of the charter was in regard to the railroads of New Jersey. The form of it, I think, was this: Fish was taxed upon his shares in the railroads, as a part of his personal property in the aggregate; it was put down at its value with all the other items of his property, and he contested the valuation, insisting that that portion of his property which was represented by the shares, was not taxable. The exemption of the stock was found in the charter of the company, which provided that it should pay ten cents to the State on each passenger, "and that no other tax or impost shall be levied or assessed upon said company." The State did not assess the company, but assessed the shareholders. The Supreme Court of New Jersey said that could not be done, and your Honors were not troubled with that case because you had disposed of the Maryland case. This also confirms, by judicial authority, what I insist upon, that taxation upon the bank, and again upon the shares, is nothing but double taxation. In the same opinion the New Jersey Court say:

"The stock of incorporated banks, although the bank pays a tax on its capital, may be taxed in the hands of stockholders if authorized by the legislature, although it is a second tax on the same property. Double taxation may be unequal, oppressive, and unjust; but it is not prohibited by any constitutional provision, and it is in the discretion of the legislature, and courts cannot declare void a statute, within the constitutional power of the legislature, because its operation may appear unjust and oppressive."

Of course this topic had relation to another item of taxation, not coming within the protection of the promise of the charter and the Constitution of the United States. The Chief Justice says that we cannot strike down a tax that our legislature has put upon shares, because it has also put it on the stock; it is two taxations of the same thing; but, as our Legislature can put a double rate upon one thing

and a single rate upon another, however oppressive it may be, it is not for us to interfere.

There seems then, if your Honors please, to be very little reason for regretting the absence of judicial authorities, upon what must be considered the principal question of the case. The solution is very simple. The relation of a corporation and of the stockholders, in respect to the property which constitutes but one subject of ownership and of taxation, is a twofold relation to a single capital or value. The relation of legal and equitable title in the same land is the best analogy. So long as a tax is laid upon the property, no variety, diversity, nor complexity of title can increase the property or the tax. You cannot make the subject of taxation any larger by reason of these different titles that are carved out of it, or these different arrangements for its management. If Congress means to protect this capital under the Constitution, and this Court has held that it has authority so to do, then it means to do it in a way that practically saves it from the tax; and, so long as the exemption is applied to the property, it will exempt every form and every title in that property. The statutes of our State, in an unbroken course of legislation, have recognized this fact: that stock in the aggregate, and the corporation as a person to be taxed, represent the same property as the shares of stock and the shareholders as persons to be taxed; and they have varied, as his Honor Judge Nelson well knows, in the course of years, their forms of applying taxation to corporations, as seemed to them most convenient. Under the statute of 1813, and until the change by the Revised Statutes, all the interests of corporations in the State of New York were taxed upon the shareholders in respect of their shares, as included in the bulk of their property. From the period of the Revised Statutes, a change was made by collecting the bulk of the tax from the bulk of the property; and as a part of the same system of assessing

and collecting the tax, it was in so many words enacted, that no shares of stockholders, in corporations that were taxed by the State, should themselves pay any tax. When the stockholders paid the tax, under the old system, there was no tax on the corporation; when the corporation paid the tax, under the new system, there was none on the stockholders, by the arrangement of the law which treated the form clearly as *modal*, for the convenience of the State, for the security of the collection of the tax, and for the considerations of policy which prefer secondary rather than direct taxation, which latter our systems have avoided as much as possible. There is no reason to hold, that, in the State of New York or anywhere else, there are any principles of law, by which these propositions that are established can possibly be disturbed. I have referred in my brief to a couple of cases in the Massachusetts Reports, where this question is well considered and presented; that it is all one subject of taxation, and is taxable, under the system of the laws, either to the persons or to the corporation, as may be found convenient.

If the Court please, the exemption from taxation, enjoyed by the National Banks under the Constitution and Laws of the United States, is of the capital by reason of its investment in Federal securities; and again of its capital, its franchise, and its operations, all that it is in character, in property, and in faculty, by reason of its being an instrument of the General Government in the exercise of its constitutional powers. As the learned Judge Comstock says in the case in 23 New York Reports, "no corporation aggregate that the world ever saw ever owned anything but its capital, property, and its franchise." Nothing is added, by the creation of a corporation, to the property that the contributors put in by way of capital, except the franchise. That is added, making the artificial person a creature of law; but the franchise is all that has been added. Here we have these bodies, that

are in their capital exempt, and in their franchise exempt. What is there about them that can be taxed? This left nothing that constitutes an element of value, or of possession, or of property, to be taxed. If the franchise had come from the State, if the franchise were taxable by the State, as the creature of the State, you might find something in the constitution of the corporation (although its capital be exempted if invested in United States securities), that would endure State taxation. They might tax the franchise inordinately, or moderately; they made the franchise, and they may tax it; and the investment of the capital in United States securities does not exempt the taxation of the franchise from the power of the State; and that was the distinction which was made by some observations of Mr. Justice Nelson in the first bank tax case in 2 Black, referring to the state of the law in New York. Franchise may bear a tax, he said. The Legislature changed their law, but did not come up to the point of taxing the franchise, which was taxing for the right to be, and with reference to nothing else. The right to be a bank, the right to continue from year to year to be a bank, may be taxed. That was all that was open under the observation of this Court. They did not put the tax on the franchise, but they put the tax on the capital, on a valuation that did not make it necessary to find what it was really worth, but took a nominal value for it; and thought they had avoided the judgment of this Court by that contrivance. They had not taxed the right of the corporation to be; they had taxed its capital upon a nominal instead of a real, value. The Court said, "You may have any form of valuation you choose; but, whatever your form of valuation, you must exempt United States securities from it." That is the case in 2 Wallace. Now the contrivance here is, that of having a bank, with its franchise from the Federal Government, with its property protected under Federal law, with its operations and its capital protected

as agents and instruments of the Government, incapable of taxation, withdrawn from the taxable property of the State, and they pursue all these into the divided shares, and exact the tax upon them distributively.

What is a stockholder in a corporation? He is nothing, and has nothing, in a corporation, except by his proportion in the capital stock, and his participation in the franchise. It is to the stockholders by name that the franchise is given, they being natural persons, that they should have the franchise to be an artificial person. Is not that a form in which the natural persons are, in the purpose and apparatus of the law, used as one? There is neither fragment nor fragment for a tax to rest upon, when there is that extent of exemption.

Now, if the Court please, on the general question, as something has been said, so inconsiderately, about the comparative magnitude or connections of the interest with the government of the old United States Bank, and of this many headed institution, distributed all through the country, let me call your Honors' attention to the importance of the relations of these banks, even in the single subject of the distribution of the public debt. There was issued in one year the whole bulk, in three series, of the seven-thirty currency notes, eight hundred and thirty millions in twelve months; and, of that issue of the Federal debt, these National Banks took and distributed seven hundred and thirty-six millions, leaving to the Government, in its official organizations of treasury, sub-treasury and special agencies, only ninety-four millions out of eight hundred and thirty-millions to be so disposed of; illustrating thus what I have ventured to suggest was the genius of this institution. Now, to say of these two great governments, Federal and State, standing against one another, under the Constitution, with their relations adjudicated by this Court, that all these relations are suddenly changed by the interven-



tion of this corporate form of a National Bank, and that the State becomes the master of the two governments, by taking away from the Federal Government what it has reserved to itself, by giving back to the State Governments what they had lost under the legislation of the country, this is to make the corporation,—the mere form,—the master of the substance, and controller of those political and public relations. It is like the Genie of the bottle; when the seal is up, he becomes the master of servants. This contrivance of the National Banks, instituted for other and additional public purposes, and serving these great public needs, immediately takes in its hands hundreds of millions of Federal stocks with which to serve the Government, and in its hands, and in the hands of nobody else in this country, they can be taxed through the medium of shareholders! At this moment these banks hold six hundred and twenty-two millions of dollars of the Federal securities of the United States,—a third of the debt that is out in any other shape than that of mere currency, perhaps more than a third, for I have not the statistics in my mind; and yet that mass of public debt, free by impression on its face from taxation by the States, free in the hands of every individual, of every corporation, of every association, must contribute such taxes as the States may choose to impose, discriminating or destructive or otherwise, simply because one agency of the Government is helping it in the advancement of its interests in another public matter, to wit, the debt!

If the Court please, it will not avail anything to meet these propositions by the argument that the States, by their natural authority, have dominion for taxation over every subject of property and every person within their jurisdiction. This right and this power, as necessary parts of the State's sovereignty, are conceded; for it is idle to talk of taxation as being a special prerogative of sovereignty. It

is sovereignty. It is the sovereign that taxes. It is as universal as the sovereign. "The decree went out that all the world should be taxed," because the Roman empire extended over what was then called the world. Taxation takes all you have. Put taxation and conscription together and it is the sovereignty over the person and the property, to the extent of the jurisdiction of the State. But the taxation goes no further than sovereignty; and whatever impedes or qualifies or displaces the sovereignty of the States, impedes, qualifies, displaces, taxation by the States. What power there is in taxation to destroy, is shown by the recent Act of Congress inimical to the continuance of the State banks, which taxes their circulation, after a certain prospective period, ten per cent. If a State has power to tax, there is no limit. That you have decided over and over again. It can tax these shares discriminately, if it chooses; hostilely, destructively, fatally, if you concede the power. You say, with jealous preservation of the Constitution, "There is no such power"; and the State says, "True, but we will tax the shares or parts hostilely, destructively, fatally"; and you are called upon to say that they can; you are called upon to surrender, as I say, to this dominant fiction in law, the personality of a corporation. As by the decisions is expressly stated, whenever the Government has called the property of the citizens into the service of the United States, in the performance of a public duty under the Constitution as an instrument and an agency, that becomes an instrument of the United States, and exempted from State taxation, unless it be compatible with the public interests that the Government of the United States should concede it. There are but two methods to deal with this subject. One is that which the State of New York has always avowed, and, I believe, honestly intended to conform to. Looking at it from the side of the State, it may differ from the view that is taken on the side of the Federal Gov-

ernment, but still the principles laid down in 23 New York Reports by Chief Judge Denio are, that, when there is a conflict, the adjudications of the Supreme Court of the United States are final as to the supremacy of the Federal power, and that the only question for a State Court, as new circumstances one after another present new cases, is to see whether there is a conflict, and to yield. There is but one other method; and that is the method of South Carolina, in the decisions that are cited on the briefs. The argument of Mr. Grimké for the United States, than which none abler was ever made on this question, was never answered by Mr. Legaré, nor was it ever answered by the Court. The decision was put upon the ground, that, if there was a conflict, the State of South Carolina could not help it, but it governed what was within its own dominions. That was the proposition:—that the reasoning of the Supreme Court, by the mouth of the great Chief Justice, was vicious, unsound, dangerous. Its only viciousness was, that the supremacy of the Union over the States was asserted; its only unsoundness was, that the supremacy of the Union over the States was asserted; its only danger was, that the supremacy of the Union over the States was asserted; and this, the South Carolina method of dealing with the conflict, as we all know at last, is war.

## V

# ARGUMENT, IN DEFENCE OF THE PRESIDENT, BEFORE THE SENATE OF THE UNITED STATES SITTING AS A COURT UPON THE IMPEACHMENT OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES

## NOTE

On the 21st day of February, 1868, President Johnson addressed a note to the Secretary of War, Edwin M. Stanton, stating that, by virtue of the power and authority vested in the President under the Constitution and Laws, Mr. Stanton was removed from the office of Secretary of War, and he was directed to turn over the office to General Lorenzo Thomas, who had been authorized by the President to act as Secretary of War *ad interim*. This action of the President was considered by the House of Representatives as in direct contravention of what was known as the Tenure of Office Act, passed March 2, 1867, which had undertaken to regulate the tenure of office of appointees in the Executive Departments of the Government. It was further considered as displaying, on the part of the President, the deliberate purpose and intent to set himself above the Constitution and beyond the Law.

The removal of Secretary Stanton and the appointment of General Thomas to act as Secretary *ad interim* brought about the culmination of the struggle between Congress and the President, that had been in progress for almost the whole period of Mr. Johnson's occupancy of the presidency. This contest, between the Executive and the Legislative branches of the Government, arose from the effort to solve the great problem of the reconstruction of the Southern States and their re-establishment in the Union after the close of the Civil War. All of this forms an instructive chapter in our Constitutional history and the passage of the Tenure of Office Act was itself but one of the steps taken by Congress to assure its supremacy.

Immediately following this action of the President, and on Feb-

ruary 24, the House of Representatives, by the overwhelming vote of 126 to 47, impeached the President for high crimes and misdemeanors.

The President's action in the removal of Secretary Stanton and the appointment of General Thomas not only brought the struggle to a head, but formed the gravamen of the Articles of Impeachment that were presented at the bar of the Senate on March 4, 1868.

These Articles were eleven in number. The first eight articles are based wholly on this action of the President. The ninth known as the Emory Article, charged a conspiracy between the President and General Emory to violate a recent Act of Congress that required all orders and instructions relating to military operations, issued by the President or Secretary of War, to be issued through the General of the army and, in case of his inability, through the next in rank. The tenth article related to a number of speeches delivered by the President in the summer and fall of 1866, in which he had given vent to his anger at the attitude of Congress, in most unwise and hasty expressions of contempt for the legislative branch of the Government as it was then composed. The eleventh article was a statement in a different form of the substance of many of the averments in the preceding articles, and in general charged an effort on the part of the President to obstruct and prevent the due execution of the laws of Congress.

After answer and replication the actual trial before the Senate sitting to try the impeachment, with the Chief Justice of the United States presiding, began on March 30, 1868.

The Managers chosen by the House of Representatives to conduct the prosecution in its behalf were: John A. Bingham of Ohio, George S. Boutwell of Massachusetts, James F. Wilson of Iowa, Benjamin F. Butler of Massachusetts, Thomas Williams of Pennsylvania, Thaddeus Stevens of Pennsylvania, and John A. Logan of Illinois.

The Counsel for the President were Henry Stanbery (the Attorney-General), Benjamin R. Curtis, William M. Evarts, Thomas A. R. Nelson and William S. Groesbeck; Jeremiah S. Black, also retained by the President, had retired from the case before the trial began.

The case was opened by General Butler, in behalf of the Man-

agers, who proceeded in the conduct of the trial throughout—in the examination and cross-examination of witnesses. Upon the close of the case against the President, Judge Curtis made the opening argument for the defense on April 9 and 10, and, when the taking of testimony was finished, the closing arguments by the Managers and by Counsel for the President began. These arguments occupied the attention of the Court of Impeachment continuously for a period of two weeks, from April 22 to May 6.

Mr. Logan filed with the Court a printed argument, all the others being oral and in the following order: Mr. Boutwell spoke April 22d and during a part of the following day, when Mr. Nelson, of Counsel for the President, began his closing argument, concluding April 24th. On Saturday, April 25, Mr. Groesbeck spoke for the President. On Monday, April 27, Mr. Stevens spoke for the Managers, succeeded by Mr. Williams who concluded his argument the following day.

Mr. Evarts began his argument on the afternoon of April 28, continuing on the three succeeding days, closing on Friday the first of May. The Attorney-General, Mr. Stanbery, then proceeded with the final Argument for the President, concluding the next day. Mr. Bingham, in his argument of three days, May, 4, 5 and 6, on behalf of the Managers, made the final presentation to the Senate.

The voting on the articles did not begin until ten days later, May 16, when a vote was taken on the eleventh article, resulting in 35 voting "guilty" and 19 "not guilty." Thus the two-thirds vote required by the Constitution for conviction was not obtained. An adjournment was taken to May 26 and votes taken on the second and third articles with the same result as before. The Senate, sitting as a Court of Impeachment, then adjourned *sine die*, taking no action upon any of the remaining articles.

Mr. Evarts, besides making the closing argument in the President's behalf, which follows, had been most active in the conduct of the defence owing to the illness, during the trial, of the Attorney-General.

Six years after this historic trial, Mr. Evarts thus alludes to it, in his Eulogy on Chief Justice Chase, with especial reference to the conduct of the Chief Justice as presiding at the trial:

"The first political impeachment in our constitutional history, involving, as it did, the accusation of the President of the United States, required the Chief Justice to preside at the trial before the Senate, creating thus the tribunal to which the Constitution had assigned this high jurisdiction. Beyond the injunction that the Senate, when sitting for the trial of impeachments, should be 'on Oath' the Constitution gave no instruction to fix or ascertain the character of the procedure, the nature of the duty assigned to the specially-organized court, or the distribution of authority between the Chief Justice and the Senate. The situation lacked no feature of gravity—no circumstance of solicitude—and the attention of the whole country, and of foreign nations, watched the transaction at every stage of its progress. No circumstance could present a greater disparity of political or popular forces between accuser and accused, and none could be imagined of more thorough commitment of the body of the court—the Senate—both in the interests of its members, in their political feeling, and their prejudgments; all tending to make the condemnation of the President, upon all superficial calculations, inevitable. The effort of the Constitution to guard against mere partisan judgment, by requiring a two-thirds vote to convict, was paralyzed by the complexion of the Senate, showing more than four-fifths of that body of the party which had instituted the impeachment and was demanding conviction. To this party, as well, the Chief Justice belonged, as a founder, a leader, a recipient of its honors, and a lover of its prosperity and its fame. The President, raised to the office from that of Vice-President—to which alone he had been elected—by the deplored event of Mr. Lincoln's assassination, was absolutely without a party, in the Senate or in the country; for the party whose suffrages he had received for the vice-presidency was the hostile force in his impeachment. And to bring the matter to the worst, the succession to all the executive power and patronage of the Government, in case of conviction, was to fall into the administration of the President of the Senate—the creature, thus, of the very court invested with the duty of trial and the power of conviction.

"Against all these immense influences, confirmed and inflamed by a storm of party violence, beating against the Senate-house without abatement through the trial, the President was acquitted.

To what wise or fortunate protection of the stability of government does the people of this country owe its escape from this great peril? Solely, I cannot hesitate to think, to the potency—with a justice-loving, law-respecting people—of the few decisive words of the Constitution which, to the common apprehension, had impressed upon the transaction the solemn character of trial and conviction, under the sanction of the oath to bind the conscience, and not of the mere exercise of power, of which its will should be its reason. In short, the Constitution had made the procedure *judicial*, and not *political*. It was this sacred interposition that stayed this plague of political resentments which, with their less sober and intelligent populations, have thwarted so many struggles for free government and equal institutions.

“Over this scene, through all its long agitations, the Chief Justice presided, with firmness and prudence, with circumspect comprehension, and sagacious forecast of the vast consequences which hung, not upon the result of the trial as affecting any personal fortunes of the President, but upon the maintenance of its character as a trial—upon the prevalence of law, and the supremacy of justice, in its methods of procedure, in the grounds and reasons of its conclusion. That his authority was greatly influential in fixing the true constitutional relations of the Chief Justice to the Senate, and establishing a precedent of procedure not easily to be subverted; that it was felt, throughout the trial, with persuasive force, in the maintenance of the judicial nature of the transaction; and that it never went a step beyond the office which belonged to him—of presiding over the Senate trying an impeachment—is not to be doubted.

“The President was acquitted. The disappointment of the political calculations, which had been made upon what was felt by the partisans of impeachment to be an assured result, was unbounded; and resentments rash and unreasoning were visited upon the Chief Justice, who had influenced the Senate to be judicial, and had not himself been political. No doubt this impeachment trial permanently affected the disposition of the leading managers of the Republican party towards the Chief Justice, and his attitude thereafter toward that party, in his character of a citizen. But the people of the country never assumed any share of the resent-



ment of party feeling. The charge against him, if it had any shape or substance, came only to this: That the Chief Justice brought into the Senate, under his judicial robes, no concealed weapons of party warfare, and that he had not plucked from the Bible, on which he took and administered the judicial oath, the commandment for its observance."

### ARGUMENT

FIRST DAY, APRIL 28, 1868

I am sure, Mr. Chief Justice and Senators, that no man of a thoughtful and considerate temper would wish to take any part in the solemn transaction which proceeds to-day unless held to it by some quite perfect obligation of duty. Even if we were at liberty to confine our solicitudes within the horizon of politics; even if the interests of the country and of the party in power, and if duty to the country and duty to the party in power (as is sometimes the case, and as public men so easily persuade themselves is, or may be, the case in any juncture), were commensurate and equivalent, who will provide a chart and compass for the wide, uncertain sea that lies before us in the immediate future? Who shall determine the currents that shall flow from the event of this stupendous political controversy; who measure their force; and who assume to control the storms that it may breed?

But if we enlarge the scope of our responsibility and of our vision, and take in the great subjects that have been constantly pressing upon our minds, who is there so sagacious in human affairs, who so confident of his sagacity, who so circumspect in treading among grave responsibilities and so assured of his circumspection, who so bold in his forecast of the future, and so approved in his prescience, as to see, and to see clearly, through this day's business?

Let us be sure, then, that no man should be here as a volunteer or lift a little finger to jostle the struggle and con-

test between the great forces of our Government, of which we are witnesses, in which we take part, and which we, in our several vocations, are to assist in determining.

Of the absolute and complete obligation which convenes the Chief Justice of the United States and its Senators in this Court for the trial of this impeachment, and of its authentic commission from the Constitution, there can be no doubt. So, too, of the deputed authority of these honorable managers, and their presence in obedience to it, and the attendance of the House of Representatives itself in aid of their argument and their appeal, there is as little doubt. The President of the United States is here, in submission to the same Constitution, in obedience to it, and in the duty which he owes by the obligation he has assumed to preserve, protect, and defend it. The right of the President to appear by counsel of his choice makes it as clearly proper, under the obligations of a liberal profession, and under the duty of a citizen of a free state of sworn fidelity to the Constitution and the laws, that we should attend upon his defence; for though no distinct vocation and no particular devotion to the more established forms of public service hovers our presence, yet no man can be familiar with the course of the struggles of law, of government, of liberty in the world, not to know that the defence of the accused becomes the trial of the Constitution and the protection of the public safety.

It is neither by a careless nor capricious distribution of the most authentic service to the state that Cicero divides it among those who manage political candidacies, among those who defend the accused, and among those who in the Senate determined the grave issues of war and peace and all the business of the State; for it is in facts and instances that the people are taught their Constitution and their laws, and it is by fact and on instances that their laws and their Constitutions are upheld and improved. Constitutions are framed; laws established; institutions built up; the pro-

cesses of society go on until at length by some opposing, some competing, some contending forces in the State, an individual is brought into the point of collision, and the clouds surcharged with the great forces of the public welfare burst over his head. It is then that he who defends the accused, in the language of Cicero, and in our own recognition of the pregnant instances of English and American history, is held to a distinct public service.

As, then, duty has brought us all here to this august procedure and has assigned to each of us his part in it, so through all its responsibilities and to the end we must surrender ourselves to its guidance. Thus following, our footsteps shall never falter or be misled; and leaning upon its staff, no man need fear that it will break or pierce his side.

The service of the constitutional procedure of impeachment in our brief history as a nation has really touched none of the grave interests that are involved in the present trial. Discarding the first occasion in which it was moved, being against a member of the Senate, as coming to nothing important, political or judicial, unless to determine that a member of this body was not an officer of the United States; and the next trial, wherein the accusation against Judge Pickering partook of no qualities except of personal delinquency or misfortune, and whose result gives us nothing to be proud of, and to constitutional law gives no precedent except that an insane man may be convicted of crime by a party vote; and the last trial of Judge Humphreys, where there was no defence, and where the matters of accusation were so plain and the guilt so clear that it was understood to be, by accused, accusers, and court but a mere formality, and we have trials, doubtless of interest, of Judge Chase and of Judge Peck. Neither of these ever went for a moment beyond the gravity of an important and solemn accusation of men holding dignified, valuable, eminent, public judicial trusts; and their determination in favor of the ac-

cused left nothing to be illustrated by their trials except that even when the matter in imputation and under investigation is wholly of personal fault and misconduct in office, politics will force itself into the tribunal.

But what do we behold here? Why, Mr. Chief Justice and Senators, all the political power of the United States of America is here. The House of Representatives is here as accuser; the President of the United States is here as the accused; and the Senate of the United States is here as the court to try him, presided over by the Chief Justice, under the special constitutional duty attributed to him. These powers of our Government are here, this our Government is here, not for a pageant or a ceremony; not for concord of action in any of the duties assigned to the Government in the conduct of the affairs of the nation, but here in the struggle and contest as to whether one of them shall be made to bow by virtue of constitutional authority confided to the others, and this branch of the political power of the United States shall prove his master. Crime and violence have placed all portions of our political Government at some disadvantage. The crime and violence of the rebellion have deprived this House of Representatives and this Senate of the full attendance of members that might make up the body under the Constitution of the United States, when it shall have been fully re-established over the whole country. The crime and violence of assassination have placed the executive office in the last stage of its maintenance under mere constitutional authority. There is no constitutional elected successor of the President of the United States, taking his power under the terms of the Constitution and by the authority of the suffrage; and you have now before you the matter to which I shall call your attention, not intending to anticipate here the discussion of constitutional views and doctrines, but simply the result upon the Government of the country which may flow from your determination of this cause under the

peculiar circumstances in which, for the first time, too, in the history of the Government, a true political trial takes place.

If you shall acquit the President of the United States from this accusation all things will be as they were before. The House of Representatives will retire to discharge their usual duties in legislation, and you will remain to act with them in those duties and to divide with the President of the United States the other associated duties of an executive character which the Constitution attributes to you. The President of the United States, too, dismissed from your presence uncondemned, will occupy through the constitutional term his place of authority, and however ill the course of politics may go, or however well, the Government and its Constitution will have received no shock. But if the President shall be condemned, and if by authority under the Constitution necessarily to be exerted upon such condemnation, he shall be removed from office, there will be no President of the United States; for that name and title is accorded by the Constitution to no man who has not received the suffrages of the people for the primary or the alternative elevation to that place. A new thing will have occurred to us; the duties of the office will have been annexed to some other office, will be discharged *virtute officii* and by the tenure which belongs to the first office. Under the legislation of the country early adopted, and a great puzzle to the Congress, that designation belongs to this Senate itself to determine, by an officer of its own gaining, the right under the legislation of 1792 to add to his office conferred by the Senate the performance of the duties of President of the United States, the two offices running along. Whatever there may be of novelty, whatever of disturbance, in the course of public affairs thus to arise from a novel situation, is involved in the termination of this cause; and therefore there is directly proposed to you, as a necessary result

from one determination of this cause, this novelty in our Constitution: a great nation whose whole frame of Government, whose whole scheme and theory of politics rest upon the suffrage of the people will be without a President, and the office sequestered will be discharged by a member of the body whose judgment has sequestered it.

I need not attract your attention, long since called to it doubtless, in your own reflections, more familiar than I am with the routine, to what will follow in the exercise of those duties; and you will see at once that the situation, from circumstances for which no man is responsible, is such as to bring into the gravest possible consequences the act that you are to perform. If the President of the United States, elected by the people, and having standing behind him the second officer of the people's choice, were under trial, no such disturbance or confusion of constitutional duties, and no such shock upon the feelings and traditions of the people, would be effected; but, as I have said, crime and violence, for which none of the agents of the Government are responsible, have brought us into this situation of solicitude and of difficulty.

It will be seen, then, that as this trial brings the legislative power of the Government confronted with the executive authority, and its result is to deprive the nation of a President and to vest the office in the Senate, it is indeed the trial of the Constitution; over the head and in the person of the Chief Magistrate who fills the great office the forces of this contest are gathered, and this is the trial of the Constitution; and neither the dignity of the great office which he holds, nor any personal interest that may be felt in one so high in station, nor the great name and force of these accusers, the House of Representatives, speaking for "all the people of the United States," nor the august composition of this tribunal, which brings together the Chief Justice of the great court of the country and the Senators who have States

for their constituents, which recalls to us in the mere etiquette of our address the combined splendors of Roman and of English jurisprudence and power—not even this spectacle forms any important part in the watchful solicitude with which the people of this country are gazing upon this procedure. The sober, thoughtful people of this country, never fond of pageants when pageants are the proper thing, never attending to pageants when they cover real issues and interests, are thinking of far other things than these.

Mr. Chief Justice, it is but a few weeks since the great tribunal in which you habitually preside, and where the law speaks with authority for the whole nation, adjourned. Embracing, as it does, the great province of international law, the great responsibility of adjusting between State and General Government the conflicting interests and passions belonging to our composite system, and with determining the limits between the co-ordinate branches of the Government, there is one other duty assigned to it in which the people of the country feel a nearer and a deeper interest. It is as the guardian of the bill of rights of the Constitution, as the watchful protector of the liberties of the people against the encroachments of law and Government, that the people of the United States look to the Supreme Court with the greatest attention and with the greatest affection. That Court having before it a subject touching the liberty of the citizen finds the hamstring of its endeavor and its energy to interpose the power of the Constitution in the protection of the Constitution cut by the sharp edge of a congressional enactment, and in its breast carries away from the judgment-seat the Constitution and the law, to be determined, if ever, at some future time and under some happier circumstances.

Now, in regard to this matter, the people of the United States give grave attention. They exercise their supervision of the conduct of all their agents, of whom, in any form and in any capacity and in any majesty, they have not yet

learned to be afraid. The people of this country have had nothing in their experience of the last six years to make them fear anybody's oppression, anybody's encroachments, anybody's assaults, anybody's violence, anybody's war. Masters of this country, and masters of every agent and agency in it, they bow to nothing but the Constitution, and they honor every public servant that bows to the Constitution. And at the same time, by the action of the same Congress, the people see the President of the United States brought as a criminal to your bar, accused by one branch of Congress, to be tried by the other, his office, as I have said, to be put in commission and an election ordered. He greatly mistakes who supposes that the people of the United States look upon the office of President, the great name and power that represents them in their collective capacity, in their united power, in their combined interests, with less attachment than upon any other of the departments of this Government. The President is, in the apprehension and in the custom of the people of the United States, the magistrate, the authority for whom they have that homage and that respect which belong to the elective office. His oath of office is as familiar to the people of this country as it is to you, for they heard it during the perils of the war from lips that they revered, and they have seen its immense power under the resources of this Constitution of theirs, and supported by their fidelity to maintain the contest of this Government against all comers to sustain the Constitution and the law.

It has been spoken of here as if the President's oath were simply an oath to discharge faithfully the duties of his office, and as if the principal duty of the office was to execute the laws of Congress. Why, that is not the President's oath; that portion of it is the common oath of everybody in authority to discharge the duties of his office; but the peculiar oath of the President, the oath of the Constitution, is in the larger portion of it which makes him the sworn preserver,



protector, and defender of the Constitution itself; and that is an office and that is an oath which the people of the United States have intrusted and exacted to and from no other public servant but the President of the United States. And when they conferred that power and exacted that duty they understood its tremendous responsibilities, the tremendous oppositions it might encounter, and they understood their duty, implied in the suffrage that had conferred the authority and exacted the obligation, to maintain him in it—to maintain him in it as against foreign aggression, as against domestic violence, as against encroachments from whatever quarter, under the guise of congressional or whatever authority, upon the true vigor of the Constitution of the United States.

President Lincoln's solemn declaration, upon which he gained strength for himself and by which he gave strength to the people, "I have a solemn vow registered in heaven that I will preserve, protect, and defend the Constitution of the United States," carried him, and carried the people following him, through the struggles, the dangers, the vicissitudes of the rebellion; and that vow, as a legend, now adorns the halls of legislation in more than one State of the Union. This oath of the President, this duty of the President, the people of this country do not in the least regard as personal to him; but it is an oath and a duty assumed and to be performed as their representative, in their interest, and for their honor; and they have determined, and they will adhere to their determination, that the oath shall not be taken in vain, for that little phrase, "to the best of my ability," which is the modest form in which the personal obligation is assumed, means, when conferred upon the ability of the President, the ability of the country; and most magnificently did the people pour out its resources in aid of that oath of President Lincoln; and so when the shock comes, not in the form of violence, of war, of rebellion, but

of a struggle between the forces of the Government in regard to constitutional authority, the people of the United States regard the President as then bound to the special fidelity of watching that all the departments of this Government obey the Constitution, as well as that he obeys it himself.

They give him no assumption of authority beyond the laws and the Constitution, but all the authority and all the resources of the laws and the Constitution are open to him, and they will see to it that the President of the United States, whoever he may be, in regard to the office and its duty, shall not take this oath in vain if they have the power to maintain him in its performance. That indeed the Constitution is above him, as it is above all of the servants of the people, as it is above the people themselves until their sovereignty shall choose to change it, they do not doubt. And thus all their servants, President and Congress and whatever authority, are watched by the people of the United States in regard to obedience to the Constitution.

And, not disputing the regularity, the complete authenticity, and the adequate authority of this entire procedure, from accusation through trial and down to sentence, the people yet claim the right to see and to know that it is duty to the Constitution observed and felt throughout that brings the result, whatever it may be. Thus satisfied, they adhere to the Constitution, but they do not purpose to change it. They are converts of no theories of congressional omnipotence. They understand none of the nonsense of the Constitution being superior to the law except that the law must be obeyed and the Constitution not. They know their Government, and they mean to maintain it; and when they hear that this tremendous enginery of impeachment and trial and threatened conviction or sentence, if the law and the facts will justify it, has been brought into play, that this power which has lain in the Constitution, like a sword in its sheath, is now drawn, they wish to know what the crime is

that the President is accused of. They understand that treason and bribery are great offences, and that a ruler guilty of them should be brought into question and deposed. They are ready to believe that, following the law of that enumeration, there may be other great crimes and misdemeanors touching the conduct of Government and the welfare of the State that may equally fall within the jurisdiction and the duty. But they wish to know what the crimes are. They wish to know whether the President has betrayed our liberties or our possessions to a foreign State. They wish to know whether he has delivered up a fortress or surrendered a fleet. They wish to know whether he has made merchandise of the public trust and turned authority to private gain. And when informed that none of these things are charged, imputed, or even declaimed about, they yet seek further information and are told that he has removed a member of his cabinet.

The people of this country are familiar with the removal of members of cabinets and all persons in authority. That, on its mere statement, does not strike them as a grave offence, needing the interposition of this special jurisdiction. Removal from office is not, with the people of this country, especially those engaged in politics, a terror or a disagreeable subject; indeed it may be said that it maintains a great part of the political forces of this country; that removal from office is a thing in the Constitution, in the habit of its administration. I remember to have heard it said that an old lady once summed up an earnest defence of a stern dogma of Calvinism, that if you took away her "total depravity" you took away her religion and there are a great many people in this country that if you take away removal from office you take away all their politics. So that, on that mere statement, it does not strike them as either an unprecedented occurrence or as one involving any great danger to the State.

“Well, but how comes it to be a crime?” they inquire. Why, Congress passed a law, for the first time in the history of the Government, undertaking to control by law this matter of removal from office; and they provided that if the President should violate it, it should be a misdemeanor, and a high misdemeanor; and now he has removed, or undertaken to remove, a member of his cabinet, and he is to be removed himself for that cause. He undertook to make an *ad interim* Secretary of War, and you are to have made for you an *ad interim* President in consequence!

That is the situation. “Was the Secretary of War removed?” they inquire. No; he was not removed, he is still Secretary, still in possession of the department. Was force used? Was violence meditated, prepared, attempted, applied? No, it was all on paper, and all went no further than making the official attitude out of which a judgment of the Supreme Court could be got. And here the Congress intercepting again and in reference to this great office, this great authority of the Government, instead of the liberty of the private citizen, recourse to the Supreme Court,—has interposed the procedure of trial and impeachment of the President to settle, by its own authority, this question between it and the Executive. The people see and the people feel that under this attitude of Congress there seems to be a claim of right and an exercise of what is supposed to be a duty, to prevent the Supreme Court of the United States interposing its serene judgment in the collisions of Government and of laws upon either the framework of the Government or upon the condition and liberty of the citizen. And they are not slow to understand, without the aid of the very lucid and very brave arguments of these honorable managers, that it is a question between the omnipotence of Congress and the supremacy of the Constitution of the United States; and that is an issue on which the people have no doubt, and, from the beginning of their liberties,

they have had a clear notion that tyranny was as likely to be exercised by a Parliament or a Congress as by anybody else.

The honorable managers have attracted our notice to the principles and the motives of the American Revolution as having shown a determination to throw off the tyranny of a king, and they have told us that that people will not bend its neck to the usurpations of a President. That people will not bend its neck to the usurpations of anybody. But the people of the United States know that their fathers went to war against the tyranny of Parliament, claiming to be good subjects of the king and ready to recognize his authority, preserving their own legislative independence, and against the tyranny of Parliament they rebelled; and, as a necessity finally of securing liberty against Parliament, severed their connection with the mother country; and if any honorable member of either house will trace the working of the ideas in the convention that framed the Constitution of the United States, he will discover that inordinate power which should grow up to tyranny in the Congress was more feared, more watched, more provided against than any other extravagance that the workings of our Government might be supposed possible to lead to.

Our people, then, are unwilling that our Government should be changed; they are unwilling that the date of our Constitution's supremacy should be fixed, and that any department of this Government should grow too strong or claim to be too strong for the restraints of the Constitution. If men are wise they will attain to what was sagacious, and if obeyed in England might have saved great political shocks, and which is true for our obedience and for the adoption of our people now as it was then. Said Lord Bacon to Buckingham, the arbitrary minister of James I:

As far as it may lie in you, let no arbitrary power be intruded; the people of this kingdom love the laws thereof, and nothing will

oblige them more than a confidence of the free enjoyment of them; what the nobles upon an occasion once said in Parliament, *Nolumus leges Angliæ mutari*, is imprinted in the hearts of all the people. (1 Bacon's Works, p. 712.)

And in the hearts of all the people of this country the supremacy of the Constitution and obedience to it are imprinted, and whatever progress new ideas of parliamentary government instead of executive authority dependent upon the direct suffrage of the people may have been made with theorists or with statesmen, they have made no advance whatever in the hearts or in the heads of the people of this country.

I know that there are a good many persons who believe that a written constitution for this country, as for any other nation, is only for a nascent state and not for one that has acquired the pith and vigor of manhood. I know that it is spoken of as the swathing bands that may support and strengthen the puny limbs of infancy, but shame and encumber the maturity of vigor. This I know, and in either house I imagine sentiments of that kind have been heard during the debates of the last two Congresses; but that is not the feeling or the judgment of the people; and this in their eyes, in the eyes of foreign nations, in the eyes of the enlightened opinion of mankind, is the trial of the Constitution, not merely in that inferior sense of the determination whether its powers accorded to one branch or other of the Government have this or that scope and impression and force, but whether a government of a written constitution can maintain itself in the forces prescribed and attributed by the fundamental law, or whether the immense passions and interests of a wealthy and powerful and populous nation will force asunder all the bonds of the Constitution, and in the struggle of strength and weight the natural forces, uncurbed by the supreme reason of the state, will determine the success of one and the subjection of the other.

Now, Senators, let us see to it that in this trial and this controversy we understand what is at stake and what is to be determined. Let us see to it that we play our part as it should be played and under the motives and for the interests that should control statesmen and judges. If, indeed, this, our closely cinctured liberty, is at last to loosen her zone, and her stern monitor, law, debauched and drunken with this new wine of opinion that is crushed daily from ten thousand presses throughout this land, is to withdraw its guardianship, let us be counted with, those who, with averted eye and reverent step backward, seek to veil this shameless revelry, and not with those who exult and cheer at its excesses. Let us so act as that what we do and what we purpose and what we wish shall be to build up the State, to give new stability to the forces of the Government, to cure the rash passions of the people, so that it may be said of each one of us, *ad rempublicam firmandam et ad stabiliendas vires et sanandum populum omnis ejus purgebat institutio.*

Thus acting, thus supported, doubt not the result shall be in accord with these high aspirations, these noble impulses, these exalted duties; and whether or no the forces of this Government shall feel the shock of this special jurisdiction in obedience to law, to evidence, to justice, to duty, then you will have built up the Government, amplified its authority, and taught the people renewed homage to authority.

And now, this brings me, Mr. Chief Justice and Senators, to an inquiry asked very early in this cause with emphasis and discussed with force, with learning, and with persistence, and that is, is this a court? I must confess that I have heard defendants arguing that they were *coram non judice* before somebody that was not a judge, but I never heard till now of a plaintiff or a prosecutor coming in and arguing that there was not any court, and that his case was *coram non judice*. Nobody is wiser than the intrepid manager who assumed the first assault upon this Court, and he knew that

the only way he could prevent his cause from being turned out of court was to turn the court out of his cause and if the expedient succeeds his wisdom will be justified by the result, and yet it would be a novelty. It is said:

There is no word in the Constitution which gives the slightest coloring to the idea that this is a court, except that in this particular case the Chief Justice must preside.

So that the Chief Justice's gown is the only shred or patch of justice that there is within these halls; and it is only accidentally that that is here, owing to the peculiar character of the inculpatated defendant.

This is a Senate to hold an inquest of office upon Andrew Johnson.

And I suppose, therefore, to find a verdict of "office found." Certainly, it is sought for. I have not observed in your rule that each Senator is to rise in his place and say "office found," or "office not found." Probably every Senator does not expect to find it. Your rules, your Constitution, your habit, your etiquette call it a court, assume that there is some procedure here of a judicial nature; and we found out finally on our side of this controversy that it was so much of a court at least that we could not put a leading question in it; and that is about the extreme exercise of the authority of a court in regard to the conduct of procedure that we lawyers habitually discover.

The Constitution, as has been pointed out to you, makes this a court; it makes its proceeding a trial; it assigns a judgment; it accords a power of punishment to its procedure; and it provides that a jury in all judicial proceedings of a criminal character shall be necessary except in this Court and on this form of procedure. We may assume, then, that so far as words go, it is a court and nothing but a court.

But it is a question, the honorable manager says, "of substance, and not of form." He concedes that if it be a



court you must find upon the evidence something to make out the guilt of the offender to secure a judgment, and he argues against its being a court, not from any nice criticism of words or form, but, as he expresses it, for the substance. He has instructed you, by many references, and by an interesting and learned brief appended to his opening speech, in English precedents and authority to show that it is almost anything but a court; and perhaps during the hundreds of years in which the instrument of impeachment was used as a political engine, if you look only to the judgment and the reasons of the judgment, you would not think it was really a very judicial proceeding; but that through all the English history it was a proceeding in court, controlled by the rules of the court as a court, cannot be doubted.

Indeed, as we all know, though the learned manager has not insisted upon it, the presence of the trial, under the peculiar procedure and jurisdiction of impeachment in the House of Lords, was but a part of the general jurisdiction of the House of Lords, as the great court of the kingdom, in all matters civil and criminal, and one of the favorite titles of the lords of Parliament in those earlier days was "judges of Parliament;" and now the House of Lords in England is the supreme court of that country as distinctly as our great tribunal of that name is of this country.

But one page of pretty sound authority, I take it, will put to flight all these dreamy, misty notions about a law and procedure of Parliament in this country and in this tribunal that is to supersede the Constitution and the laws of our country, when I show you what Lord Chancellor Thurlow thought of that subject as prevalent or expected to prevail in England. In Hastings's trial, Lord Loughborough having endeavored to demonstrate that the ordinary rules of proceeding in criminal cases did not apply to parliamentary impeachments, which could not be shackled by the forms observed in the courts below, Lord Thurlow said:

My lords, with respect to the laws and usage of Parliament, I utterly disclaim all knowledge of such laws. It has no existence. True it is, in times of despotism and popular fury, when to impeach an individual was to crush him by the strong hand of power, of tumult, or of violence, the laws and usage of Parliament were quoted in order to justify the most iniquitous or atrocious acts. But in these days of light and Constitutional Government, I trust that no man will be tried except by the laws of the land, a system admirably calculated to protect innocence and to punish crime.

And after showing that in all the state trials under the Stuart reigns, and even down to that of Sachaverel, in every instance were to be found the strongest marks of tyranny, injustice, and oppression, Lord Thurlow continued:

I trust your lordships will not depart from recognized, established laws of the land. The Commons may impeach, your lordships are to try the cause; and the same rules of evidence, the same legal forms which obtain in the courts below, will, I am confident, be observed in this assembly. (*Wraxall's Memoirs*, p. 275.)

But the learned manager did not tell us what this was if it was not a court. It is true he said it was a Senate, but that conveys no idea. It is not a Senate conducting legislative business; it is not a Senate acting upon executive business; it is not a Senate acting in caucus on political affairs; and the question remains, if it is not a court what is it? If this is not an altar of justice which we stand about, if we are not all ministers here of justice, to feed its sacred flame, what is the altar and what do we do here about it? It is an altar of sacrifice if it is not an altar of justice; and to what divinity is this altar erected? What, but the divinity of party hate and party rage, a divinity to which we may ascribe the Greek character given of envy, that it is at once the worst and the justest divinity, for it dwarfs and withers its worshippers. That, then, is the altar that you are to minister about, and that the savage demon you are to exalt here in displacing justice.

Our learned managers, representing the House of Representatives, do not seem to have been at all at pains to conceal the party spirit and the party hate which displayed itself in the haste, in the record, and in the maintenance of this impeachment. To show you what progress may make in the course of thirty years in the true ideas of the Constitution, and of the nature of impeachments, let me read to you what the managers of the impeachment of Judge Peck had to say in his behalf. And a pretty solid body of managers they were, too: Judge Ambrose Spencer, of New York; Mr. Henry R. Storrs, of New York; Mr. McDuffie, of South Carolina; Mr. Buchanan, of Pennsylvania, and Mr. Wickliffe, of Kentucky. Ambrose Spencer, as stern a politician as he was an upright judge, opened the case, and had a word to say on the subject of party spirit and party hate. Let me ask your attention to it:

There is, however, one cheering and consolatory reflection. The House of Representatives, after a patient and full examination, came to the resolution to impeach Judge Peck by a very large majority; and the record will show an absence of all party feeling. Could I believe that that baleful influence had mingled itself with and predominated in that vote, no earthly consideration could have prevailed on me to appear here as one of the prosecutors of this impeachment. I have not language to express the abhorrence of my soul at the indulgence of such unhallowed feelings on such a solemn procedure. (Peck's Trial, p. 289.)

Mr. Manager Butler talked to you many hours. Did he say anything wiser, or juster, or safer for the republic than that? Judge Spencer knew what it was to be a judge and to be a politician. For twenty years while he was on the bench of New York, the great judicial light in the common-law jurisdiction of that State, he was a head and leader of a political party, vehement and earnest and unflinching in support of its measures and in the conduct of its discipline; and yet no lawyer, no suitor, no critic ever ventured to say,

or to think, or to feel that Judge Spencer on the bench was a politician or carried any trait or trace of party feeling or interest there. Judge Spencer was a politician in the House of Representatives then; but Judge Spencer in the management of an impeachment could only say that if party feeling mingled in it he would have nothing to do with it, for his soul abhorred it in relation to so solemn a procedure. Yes, indeed, this divinity of party hate, when it possess a man, throws him now into the fire and now into the water, and he is unsuitable to be a judge until he can come again clothed and in his right mind to hear the evidence and administer the law.

But to come down to the words of our English history and experience, if this is not a court it is a scaffold, and an honorable manager yesterday told you so, that each one of you brandished now a headsman's axe to execute vengeance, you having tried the offender on the night of the 21st of February already. I would not introduce these bold words that should make this a scaffold, in the eyes of the people of this country, and you headsman brandishing your axes, but the honorable manager has done so, and I have no difficulty in saying to you that if you are not a court, then you are that which he described and nothing else. If it be true that on the night of the 21st of February, upon a crime committed by the President at midday of that date and on an impeachment moving already forward to this chamber from the House of Representatives, you did hold a court and did condemn, then you are here standing about the scaffold of execution, and the part that you are to play is only that which was assigned you by the honorable manager, Mr. Stevens, and he warned you, held by fealty to your own judgments, not to blench at the sight of the blood.

Now, to what end is this prodigious effort to expel from this tribunal all ideas of court and of justice? What is it but a bold, reckless, rash, and foolish avowal that if it be a

court, there is no cause here that, upon judicial reason, upon judicial scrutiny, upon judicial weighing and balancing of fact and of law, can result in a judgment which the impeaching party here, the managers and House of Representatives, demand and constitutionally may demand to be done by this Court? At last, to what end are the wisdom, and the courage, the civil prudence and the knowledge of history which our fathers brought to the framing of the Constitution; of what service this wise, this honest frown in the Constitution upon *ex post facto* laws and bills of attainder? What is a bill of attainder; what is a bill of pains and penalties in the experience and in the learning of English jurisprudence and parliamentary history? It is a proceeding by the legislature, as a legislature, to enact crime, sentence, punishment, all in one. And certainly there is no alternative for you; if you do not sit here under law to examine evidence, to be impartial, and to regard it as a question of personal guilt to be followed by personal punishment and personal consequences upon the alleged delinquent, then you are enacting a bill of pains and penalties upon the simple form that a majority of the House and two-thirds of the Senate must concur, and the Constitution and the wisdom of our ancestors all pass for nought.

Our ancestors were brave and wise, but they were not indifferent to the dangers that attended this tribunal. They had no resource in the Constitution, where they could so well fix this necessary duty in a free Government to hold all its servants amenable to public justice, for the public service, except to devolve it upon this Senate; but let me show you within the brief compass of the debate, and the only material debate, in the Journal of the Convention that framed the Constitution, how the fears and the doubts predominated:

Mr. Madison objected to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the

legislature; and for any act which might be called a misdemeanor. The President, under these circumstances, was made improperly dependent. He would prefer the Supreme Court for the trial of impeachments; or, rather, a tribunal of which that should form a part.

Mr. Gouverneur Morris thought no other tribunal than the Senate could be trusted. The Supreme Court were too few in numbers, and might be warped or corrupted. He was against a dependence of the Executive on the legislature, considering the legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate would say untruly, on their oaths, that the President was guilty of crimes or facts, especially as in four years he can be turned out.

That was Gouverneur Morris's wisdom as to the extent to which the Senate might be trusted under the sanctions and obligations of judicial oaths; but—

Mr. Pinckney disapproved of making the Senate the court of impeachments, as rendering the President too dependent on the legislature. If he opposes a favorite law the two houses will combine against him, and, under the influence of heat and faction, throw him out of office. (5 Madison Papers, p. 528.)

There is the sum and substance of the wisdom that our ancestors could bring to the subject of whether this was to be, or could be, a court. It is undoubtedly a very great burden and a very exhaustive test upon a political body to turn it into a court for the trial of an executive official in ordinary circumstances. I shall hereafter point out to you the very peculiar, the very comprehensive and oppressive concurrence and combination of circumstances as bearing on this trial that require of you to brace yourselves upon all the virtue that belongs to you and to hold on to this oath for the Divine aid that may support you under this most extraordinary test of human conduct to which our Constitution subjects you to-day. Now, what could the Constitution do for us? A few little words, and that is all—truth, justice,

oath, duty. And what does the whole scope of our moral nature and the whole support we may hope from a higher aid extend to in any of the affairs of life but these? Truth, justice, oath, duty control the fate, life, liberty, character, and property of every citizen. Truth, justice, oath, duty are the ideas that the Constitution has forced upon your souls to-day. You receive them or you neglect them; whichever way you turn you cannot be the same men afterward that you were before. Accepted, embraced, obeyed, you are nobler and stronger and better. Spurned, rejected, you are worse and baser and weaker and wickeder than before. And it is thus that by strong ideas a free Government must always be held to the path of duty and to the maintenance of its own authority and to the prevalence of its own strength for its perpetual existence.

They are little words, but they have great power. Truth is to the moral world what gravitation is to the material; it is the principle upon which it is established and coheres; and justice in the adaptation of truth to the affairs of men is in human life what the mechanism of the heavens is to the principle that sustains the forces of the globe. Duty is acceptance, obedience to these ideas, and this once gained secures the operation which was intended. When, then, you bend submissive to this oath, that faith among men which, as Burke says, "holds the moral elements of the world together," and that faith in God which binds that world to His throne, subdue you to the service of truth and justice; and the ever-living guardian of human rights and interests does not neglect what is essential to the preservation of the human race and its advancement. The purity of the family and the sanctity of justice have ever been cared for, and will ever be cared for. The furies of the Greek mythology had charge of the sanctions of an oath. The imaginations of the prophets of the world have sanctioned the solemnity of an oath, and peopled the place of punishment with oath-

breakers; and all the tortures and torments of history are applied to public servants who, in betrayal of sworn trust, have disobeyed those high, those necessitous obligations without which the whole fabric of society falls in pieces.

I do not know why or how it is that we are so constituted, but so it is. The moral world has its laws as well as the material. Why a point of steel lifted above temple or home, should draw the thunderbolt and speed it safely to the ground I know not. How, in our moral constitution, an oath lifted to heaven can draw from the great swollen cloud of passion and of interest and of hate its charge I know not, but so it is. And be sure that loud and long as these honorable managers may talk, although they speak in the voice of "all the people of the United States," with their bold persuasions that you shall not obey a judicial oath, I can bring against it but a single sentence and a single voice; but that sentence is a commandment and that voice speaks with authority, "Thou shalt not take the name of the Lord thy God in vain, for the Lord will not hold him guiltless that taketh his name in vain."

The moth may consume the ermine of that supreme justice whose robes you wear; rust, Senators, may corrode the sceptre of your power; nay, Messrs. Managers, time even shall devour the people whose presence beating against the doors of this Senate-house, you so much love to vaunt and menace, but of the word that I have spoken "heaven and earth shall pass away and no jot or tittle of it fail."

I have now reached, Mr. Chief Justice and Senators, a point where an adjournment would be agreeable, if such is the pleasure of the Senate.

SECOND DAY, APRIL 29, 1868

Mr. Chief Justice and Senators, if indeed we have arrived at a settled conclusion that this is a court, that it is governed by the law, that it is to confine its attention to the



facts applicable to the law, and regard the sole evidence of those facts to be embraced within the testimony of witnesses or documents produced in court, we have made great progress in separating, at least, from your further consideration much that has been impressed upon your attention heretofore.

If the idea of power and will is driven from this assembly, if the President is here no longer exposed to attacks upon the same principle on which men claim to hunt the lion and harpoon the whale, then, indeed, much that has been said by the honorable managers, and much that is urged upon your attention from so many quarters, falls harmless in your midst. It cannot be said of this Senate, *fertur numeris leges solutis*, that it is carried by numbers unrestrained by law. On the contrary, right here is might and power; and, as its servants and in its investigation and pursuit, your sole duty is exhausted. It follows from this that the President is to be tried upon the charges which are produced here, and not upon common fame, and least of all is he to be charged in your judgment, as he has been inveighed against hour after hour in argument, upon charges which the impeaching authority of the House of Representatives deliberately threw out as unworthy of impeachment and unsuitable for trial. We, at least, when we have an indictment brought into court and another indictment ignored and thrown out, are to be tried upon the former and not upon the latter. And if, on the 9th of December of the last year, the House of Representatives, with whom, by the Constitution, rests the sole impeaching power under this Government, by a vote of one hundred and seven to fifty-seven, threw out all the topics that fill up the declamatory addresses of the learned managers, it is enough for me to say, that for reasons satisfactory to that authority, the House of Representatives, that bill was thrown out and those charges were withheld.

So, too, if it be a trial on public prosecution, and with

the ends of public justice alone in view, the ordinary rule of restraint of the conduct of the prosecuting authorities applies here; and I do not hesitate to say that this trial—to be, in our annals, the most conspicuous that our history will present; to be scrutinized by more professional eyes, by the attention of more scholars at home and abroad; to be preserved in more libraries; to be judged of as a national trait, a national scale, a national criterion forever—presents an unexampled spectacle of a prosecution that overreaches judgment from the very beginning and inveighs and selects and impugns and oppresses as if already convicted, at every stage, the victim they pursue. The duty, the constraint upon a prosecuting authority under a government of law pursuing only the public justice, is scarcely less strict and severe than that which rests upon the judge himself. To select evidence, having possession of better; to exclude evidence, knowing that it bears upon the inquiry; to restrict evidence, knowing that the field is thus closed against the true point of justice, is no part of a prosecuting authority's duty or power. Whatever may be permitted in the private contests of the forum, in the zeal of contending lawyers for contending clients, there is no such authority, no such duty, no such permission by our laws in a public prosecution. Much less, when the proofs have been thus kept narrow, when the charges are thus precise and technical, is it permissible for a prosecuting authority to enlarge the area of declamation and invective. Much less is it suitable for a public prosecution to inspire in the minds of the Court prejudice and extravagance of jurisdiction beyond the points properly submitted.

It has usually been supposed that, upon actual trials involving serious consequences, forensic discussion was the true method of dealing with the subject, and we lawyers, appearing for the President, being, as Mr. Manager Boutwell has been polite enough to say, "attorneys whose practice of

the law has sharpened but not enlarged their intellects," have confined ourselves to that method of forensic discussion. But we have learned here that there is another method of forensic controversy which may be called the method of concussion. I understand the method of concussion to be to make a violent, noisy, and explosive demonstration in the vicinity of the object of attack, whereas the method of discussion is to penetrate the position, and if successful to capture it. The Chinese method of warfare is the method of concussion, and consists of a great braying of trumpets, sounding of gongs, shouts, and shrieks in the neighborhood of the opposing force, which rolled away and the air clear and calm again, the effect is to be watched for. But it has been reserved for us in our modern warfare, as illustrated during the rebellion, to present a more singular and notable instance of the method of warfare by concussion than has ever been known before. A fort impregnable by the method of discussion, that is, penetrating and capturing it, has been on the largest scale attempted by the method of concussion, and some two hundred and fifty tons of gunpowder in a hulk moored near the stone walls of the fort has been made the means and the occasion of this vast experiment. Unsatisfied with that trial and its result, the honorable manager who opened this case [Mr. Butler] seems to have repeated the experiment in the vicinity of the Senate. The air was filled with epithets, the dome shook with invective. Wretchedness and misery and suffering and blood, not included within the record, were made the means of this explosive mixture. And here we are, surviving the concussion, and after all reduced to the humble and homely method of discussion, which belongs to "attorneys whose intellects have been sharpened but not enlarged by the practice of law."

In approaching, then, the consideration of what constitutes impeachable offences, within the true method and duty of that solemn and unusual procedure and within the Con-

stitution, we see why it was that the effort was to make this an inquisition of office instead of a trial of personal and constitutional guilt; for if it is an inquest of office, "crown's quest law" will do throughout for us, instead of the more solemn precedents and the more dignified authorities and duties which belong to solemn trial. Mr. Manager Butler has given us a very thorough and well-considered suggestion of what constitutes an impeachable offence. Let me ask your attention to it; and every one of these words is underscored by the honorable manager:

We define, therefore, an impeachable high crime or misdemeanor to be one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for any improper purpose.

See what large elements are included in this, the manager's definition! It must be "subversive of some fundamental or essential principle of government," "highly prejudicial to the public interest," and must proceed from "improper motives" and for an "improper purpose." That was intended, in the generality of its terms, to avoid the necessity of actual and positive crime; but it has given us in one regard everything that is needed to lift the peccability of these technical offences of mere statutory infraction out of the region of impeachable offence. It is not that you may accuse of a definite and formal crime, and then have outside of your indictment, not covered by charge or admitted for proof or countervailing proof, large accusations that touch these general subjects, but that the act under inquiry, charged and proved or refuted by proof, must be of itself such as, within its terms and regular and natural consequence, thus touches vital interests or fundamental principles.

The fallacy of these general qualifying terms is in making them the substance of the crime instead of the conditions of impeachability. You must have the crime definite under law and Constitution, and even then it is not impeachable unless you affect it with some of the public and general and important qualities that are indicated in this definition of the learned and honorable manager.

We may look, perhaps, at the statement made by the managers of the House of Representatives on this subject of what constitutes an impeachable offence in the trial of Judge Peck, Mr. Buchanan, of Pennsylvania, chairman of the managers, being the speaker:

What is an impeachable offence? This is a preliminary question which demands attention. It must be decided before the Court can rightly understand what it is they have to try. The Constitution of the United States declares the tenure of the judicial office to be "during good behavior." Official misbehavior, therefore, in a judge, is a forfeiture of his office; but when we say this we have advanced only a small distance. Another question meets us. What is misbehavior in office? In answer to this question, and without pretending to furnish a definition, I freely admit we are bound to prove that the respondent has violated the Constitution, or some known law of the land. This, I think, was the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate in the articles of impeachment against him. (Peck's Trial, p. 427.)

That crime, in the sense of substantial guiltiness, personal delinquency, moral opprobrious blame, is included even under the largest and most liberal accusation that was espoused and defended by the managers in Hastings's impeachment, is to be gathered from one of the many splendid passages of Burke's invective in that cause:

As to the crime which we charge, we first considered well what it was in its nature, and under all the circumstances which attended it. We weighed it with all its extenuations and with all its aggra-

vations. On that review we are warranted to assert that the crimes with which we charge the prisoner at the bar are substantial crimes; that they are no errors or mistakes, such as wise and good men might possibly fall into; which may even produce very pernicious effects without being, in fact, great offences. The Commons are too liberal not to allow for the difficulties of a great and arduous public situation. They know too well the domineering necessities which frequently occur in all great affairs. They know the exigency of a pressing occasion which in its precipitate career bears everything down before it, which does not give time to the mind to recollect its faculties, to re-enforce its reason, and to have recourse to fixed principles, but by compelling an instant and tumultuous decision too often obliges men to decide in a manner that calm judgment would certainly have rejected. We know, as we are to be served by men, that the persons who serve us must be tried as men, and with a very large allowance indeed to human infirmity and human error. This, my lords, we knew, and we weighed before we came before you. But the crimes which we charge in these articles are not lapses, defects, errors of common human frailty, which, as we know and feel, we can allow for. We charge this offender with no crimes that have not arisen from passions which it is criminal to harbor; with no offences that have not their root in avarice, rapacity, pride, insolence, ferocity, treachery, cruelty, malignity of temper; in short, in nothing that does not argue a total extinction of all moral principle, that does not manifest an inveterate blackness, dyed ingrain with malice, vitiated, corrupted, gangrened to the very core. If we do not plant his crimes in those vices which the heart of man is made to abhor, and the spirit of all laws, human and divine, to interdict, we desire no longer to be heard on this occasion. Let everything that can be pleaded on the ground of surprise or error upon those grounds be pleaded with success; we give up the whole of those predicaments. We urge no crimes that are not crimes of forethought. We charge him with nothing that he did not commit upon deliberation; that he did not commit against advice, supplication, and remonstrance; that he did not commit against the direct command of lawful authority; that he did not commit after reproof and reprimand, the reproof and reprimand of those who are authorized by the laws to

reprove and reprimand him. The crimes of Mr. Hastings are crimes not only in themselves, but aggravated by being crimes of contumacy. They were crimes not against forms, but against those eternal laws of justice which are our rule and our birthright. His offences are not in formal, technical language, but in reality, in substance and effect, *high* crimes and high misdemeanors. (Burke's Works, vol. 7, pp. 13, 14.)

And so the articles charged them, not leaving it to the declamation or invention of the orators of that great occasion. I need not insist, in repetition of the very definite, concise, and I must think effective argument of the learned counsel who opened this case for the respondent [Mr. Curtis], upon the strict constitutional necessity, under the clause prohibiting *ex post facto* laws, and under the clause prohibiting bills of attainder, and under the clauses that fix the trial as for crime in the Constitution under the designation in the articles of enumeration of "treason" and "bribery" alone, the highest great crimes against the State that can be imagined, that you should have here what is crime against the Constitution and crime against the law, and then that it should have those public proportions that are indicated in the definition of the opening manager, and those traits of freedom from error and mistake and doubt and difficulty which belong, in the language of Mr. Burke, to an arduous public station. And then you will perceive that under these necessary conditions either this judgment must be arrived at, that there is no impeachable offence here which covers and carries with it these conditions, or else that the evidence offered on the part of the respondent that was to negative, that was to countervail, that was to reduce, that was to refute all these qualifications should have been admitted; and when a court like this has excluded the whole range of evidence relating to the public character of the accused and the difficulties of an arduous public situation, it must have determined that the crimes charged

do not partake of that quality, or else it would have required them to have been affirmatively supported by proofs giving those qualifications, and permitted them to be reduced by countervailing evidence. And when a court sits only for a special trial, when its proceedings are incapable of review, when neither its law nor its fact can be dissected, even by reconsideration within its own tribunal, the necessary consequence is that, when you come to make up your judgment, either you must take as for granted all that we offered to prove, all that can fairly be embraced as to come in, in form, in substance, in color, and in fact, by the actual production of such proof, so that your judgment may thus proceed; or else it is your duty before you reach the irrevocable step of judgment and sentence to resume the trial and call in the rejected evidence. I submit it to you that a court without review, without new trial, without exception, and without possible correction of errors, must deal with evidence in this spirit and upon this rule. And unless you arrive, as I suppose you must, at the conclusion that the dimensions of this trial relate to the formal, technical infraction of the statute law that has been adduced in evidence here, it will be your duty to reopen your doors, call the respondent again before you, and go into the field of inquiry that has been touched in declamation, but has not been permitted in proof.

But Mr. Chief Justice and Senators, there is no better mode of determining whether a crime accorded to a particular jurisdiction and embraced within a particular prohibition is to be a high crime and misdemeanor, and what a high crime and misdemeanor means, and what the lowest level and the narrowest limit of its magnitude and of its height must be, than to look at its punishment. Epithets, newly-invented epithets, used in laws do not alter the substance of things. Your legislation of the 2d of March, 1867, introducing into a statute law the qualifying word "high," applied



to a misdemeanor, is its first appearance in the statute law of this country or of the parent country from whom we draw our jurisprudence. It means nothing to a lawyer. There is in the conspiracy act of 1861 the same introduction of the word "high" as applied to the body of the offence there called "a crime." A "high crime" it is called in this little conspiracy act of 1861, and there in the one instance and here in the other an epithet is thrown into an act of Congress. But, Mr. Chief Justice and Senators, when the legislative authority in its scale of punishment makes it, as the common sense of mankind considers, great in its penalty, terrible in its consequences, that is a legislative statement of what the quality of the crime is. When you put into a statute that the offence shall be punished by death you need no epithet to show that that is a great, a heinous crime; and when the framers of this Constitution put into it, as the necessary result of the trial of the President of the United States and his conviction, that his punishment should be deprivation of office, and that the public should suffer the necessity of a new election, that showed you what they meant by "high crime or misdemeanor."

I know that soft words have been used by every manager here on the subject of the mercy of our Constitution and the smallness of the punishment; that it does not touch life, limb, or property. Is that the sum of penalties? Is that the measure of oppression of punishment? Why, you might as well say that when the mother feels for the first time her new-born infant's breath, and it is snatched from her and destroyed before her eyes, she has not been deprived of life, liberty, or property. In a republic where public spirit is the life, and where public virtue is the glory of the state, and in the presence of public men possessing great public talents, high public passions, and ambitions, made up, as this body is, of men sprung, many of them, from the ordinary condition of American life, and by the force of their native talents,

and by the high qualities of endurance and devotion to the public service, who have lifted themselves into this eminent position, if not the envy, the admiration of all their countrymen, it is gravely proposed to you, some of whom from this elevated position do not disdain to look upon the presidency of the United States as still a higher, a nobler, a greater office, if not of pride, yet of duty, that you shall feel and say that it is a little thing to take a President from his public station and strike him to the ground, branded with high crime and misdemeanor, to be a byword and reproach through the long gauntlet of history forever and forever. In the great hall of Venice, where long rows of doges cover with their portraits the walls, the one erased, the one defaced canvas attracts to it every eye; and one who has shown his devotion to the public service from the earliest beginning, and you who have attended in equal steps that same ascent upward, and now, in the very height and flight of your ambition, feel your pinions scorched and the firm sockets of your flight melted under this horrid blaze of impeachment, are to be told, as you sink forever, not into a pool of oblivion, but of infamy, and as you carry with you to your posterity to the latest generation this infamy, that it is a trifling matter, and does not touch life, liberty, or property! If these are the estimates of public character, of public fame, and of public disgrace by which you, the leaders of this country, the most honored men in it, are to record your estimate of the public spirit and of the public virtue of the American state, you have indeed written for the youth of this country the solemn lesson that it is dust and ashes.

Now, what escape is there from this conclusion, in every true estimate of the character of this procedure and of the result that you seek to fasten upon this President if justice requires it, to say that it is trifling and trivial and that formal and technical crime may lead to it? Do the people of this country expect to be called to a presidential election in the

middle of a term, altering the whole calendar, it may be, of the Government, because there has been an infraction of a penal statute carrying no consequences beyond? It is accidental, to be sure, that the enforced and irregular election that may follow upon your sentence at this time concurs with the usual period of the quadrennial election; but it is merely accidental. And yet these, Senators, are gravely proposed to you as trivial results that are to follow from a judgment on an accusation of the character and of the quality that I have stated in fact, as compared with the quality and character that it should bear in truth.

In reference to this criminality of the infraction of the statute, which in the general remarks that I am making you will see furnishes the principal basis of charge that I am regarding, we may see from the statute itself what the measure of criminality there given is, what the measure under indictment would be or might be, and then you will see that that infraction, if it occurred, and if it were against the law and punishable by the law under the ordinary methods and procedures of our common courts of justice, furnishes not only no vindication of, but no support to, the notion that upon it can be ingrafted the accusation of impeachment the accusation of criminality that is impeachable, any more than any other topic of comparatively limited and trivial interest and concern. The provision is not that there must be a necessary penalty of gravity, but that under the scale of imprisonment and fine the only limit is that it shall not exceed \$10,000 of pecuniary liability and five years of imprisonment. Six cents fine, one day's imprisonment, according to the nature of the offence, within the discretion of the Court, may satisfy the public justice under indictment in regard to this offence which is claimed as the footing and front of the President's fault.

Nor was this open, unrestricted mercy of the law untended to in debate. The honorable senator from Massa-

chusetts [Mr. Sumner] in the course of the discussion of this section of the bill, having suggested that it would be well, at least, to have a moderate minimum of punishment that would secure something like substance necessarily in the penal infliction, and having suggested \$1,000 or \$500 as the lower limit, basing upon this wise intimation that some time or other there might be a trial under this section before a court that had a political bias and the judge might let the man off without any substantial punishment, he was met by the honorable senator from Vermont [Mr. Edmunds] and the honorable senator from Oregon [Mr. Williams] who seemed to have the conduct of the bill, at least in respect to these particular provisions, in the way to which I will attract your attention. Mr. Sumner said:

Shall we not in this case, where political opinion may intrude on the bench, make a provision that shall at least secure a certain degree of punishment?

Mr. Edmunds defended the unlimited discretion of punishment.

Mr. Williams said:

I concur in the views expressed by the senator from Vermont, for the reason, in the first place, that this is a new offence created by statute, and it does not define a crime involving moral turpitude, but rather a political offence; and there is some ground to suppose that mistakes may be made under this law by persons in office; and I think that in such case there should be a large discretion left to the Court.

So much for indictment; so much for the wise reasons of our legislators; and then, that being the measure and the reason, there is clamped upon this a necessary, an inevitable, an inexorable result that is to bring these vast consequences to the state and to the respondent. But even then you do not know or understand the full measure of discretion, unless you attend to the fact that such formal, technical

crimes when made the subject of conviction and of sentence in obedience to the law are, under a principle of our Constitution and of every other just, I will not say merciful, government in the world, made subjects of pardon; but under this process of impeachment, with but one punishment, and that the highest in the public fame and character of men that is known or that can be conceived, we have this further, this terrible additional quality, that the punishment is immitigable, immutable, irreversible, unpardonable, and no power whatever can lighten or relieve the load with which an impeached and convicted public servant goes forth from your chambers in a just exercise of this power of impeachment with a punishment heavier than he can bear.

And now, what answer is there to this but an answer that will take a load of punishment and of infamy from him and place it somewhere else? True it is that if he be unjustly convicted, if he be convicted for technical and formal faults, then the judgment of the great nation, of intelligent and independent men, stamps upon his judges the consequences that they have failed to inflict upon the victim of their power. Then it is that the maxim *si innocens damnatur, judex bis damnatur*, finds its realization in the terrors of public opinion and the recorded truths of history.

I have introduced these considerations simply to show you that these notions, that, if you can prove that a man has stumbled over the statute, it is essential that he should bear these penalties and these consequences, find no support in reason, none in law, none in the Constitution, none in the good sense of this high tribunal, none in the habits and views of the great people whom we represent. Indeed, we should come under the condemnation of the speaker in Terrence if we were to seek upon this narrow, necessary view, as it is urged, of law, such consequences as I have stated: *Summum jus sæpe summa est malitia*, an extremity of the law is often the extremity of wickedness.

And now I am prepared to consider the general traits and qualities of this offence charged; and I shall endeavor to pursue in the course of my argument a consideration, perhaps not always formal nor always exactly defined, of three propositions:

1. That the alleged infractions of these penal statutes are not in themselves, nor in any quality or color that has been fastened upon them by the evidence in this cause, impeachable offences.

2. Having an application to the same conclusion, that whatever else there is attendant, appurtenant, or in the neighborhood of the subjects thus presented to your consideration, they are wholly political, and not the subject of jurisdiction in this court or in any court, but only in the great forum of the popular judgment, to be debated there at the hustings and in the newspapers, by the orators and the writers, to whom we are always so much indebted for correct and accurate views on subjects presented for such determination. If I shall have accomplished this I shall have accomplished everything. I shall have drawn attention to the true dimensions in a constitutional view of the crime alleged even if it has been committed, and shall have shown by a reflex application of the argument that it is mere error and confusion, perhaps pardonable in an impeaching authority, but unpardonable in a court of judgment, to confound things political with things criminal.

And then, third, I shall ask your attention to the precise traits and facts as disclosed in the evidence charged in the articles, and bring you, I think, to a safe, an indisputable, firm, and thorough conclusion that even the alleged infractions of penal law have none of them, in fact, taken place.

Now, let us look at this criminality in the point upon which, in the largest view of any evidence in support of it given on the part of the managers, it must turn. We must separate, at least for the purpose of argument, the inuendoes,

the imputations, the aggravations that find their place only in the oratory of the managers, or only in your own minds as conversant with the political situation and enlisted zealously in the rightful controversies which belong to it as a political situation, and we are then to treat the subject in this method: that up to twelve o'clock on February the 21st, 1868, the President was innocent and unimpeachable, and at one o'clock on the same day he was guilty and impeachable of the string of offences that fill up all the articles, except that devoted to the speeches, the tenth; for whatever he did was done then at that point of time, leaving out the Emory article, which relates to a conversation on the morning of the 22d, and which I also should have excepted from these observations. What he did was all in writing. What he did was all public and official. What he did was communicated to all the authorities of the Government having relation to the subject. Therefore you have at once proposed for your consideration a fault, not of personal delinquency, not of immorality or turpitude, not one that disparages in the judgment of mankind, not one that degrades or affects the position of the malefactor; it is, as Mr. Senator Williams truly said, a "new offence," also, an offence "not involving turpitude, and rather of a political character."

Now, too, upon these proofs the offence carries no consequences beyond what its action indicates, to wit: a change in the head of a department. It is not a change of the department. It is not an attempt to wrest a department or apply an office against the law, contrary to the regulations of the Government, and turn its power against the safety or peace of the state; not in the least. Whatever imaginations may suggest, whatever invective and opprobrium may intimate, the fact is that it had no other object, had no other plan, would have had no other consequences—I mean within the limits of this indictment and of this proof—than to substitute for Mr. Stanton some other citizen of the United States

that, by and with the advice and consent of the Senate, should be approved for that high place, or to fill it, until that advice and consent should be given, by some legal *ad interim* holder of the office, not filling it, but discharging its duties.

If, then, the removal had been effected, if the effort to assert a constitutional authority by the President had been effectual, no pretence is made, or can be made, that anything would have been accomplished that could be considered as a turning of the Government or any branch of its service out of the authority of law. Neither did it in purpose or consequences involve any change in the policy of the Executive of the United States in the War Department or in its management. Whatever there might have been of favor or support in public opinion, in political opinion, in the wishes and feelings of the Congresses of the United States in favor of Mr. Stanton for that post, and however well deserved all that might be, Senators cannot refuse to understand that that does not furnish a reason why the offence committed by a change of the head of a department should be exaggerated into a crime against the safety of the State.

But I think we may go further than that, and say that however great may have been the credit with the houses of Congress and with the people, or with the men of his own party, which the Secretary of War, Mr. Stanton, enjoyed, it cannot be denied that there was a general and substantial concurrence of feeling in this body, among all the public men in the service of the Government, and among the citizens in general, that the situation disclosed to public view and public criticism, of an antagonism between the head of a department and the President of the United States, was not suitable to the public service, and was not to be encouraged as a situation in the conduct of the Executive Government, and that there was a general opinion among thoughtful and considerate people that, however much the politics



of the Secretary of War might be regarded as better than the politics of the President, if we would uphold the frame of Government and recognize the official rights that belong to the two positions, it was a fair and just thing for the President to expect that the retirement should take place on the part of the Secretary, rather than that he, the President, should be driven to a forced resignation himself, or to the necessity of being maimed and crippled in the conduct of the public service.

It follows necessarily, then, that the whole criminality, in act, in purpose, and in consequence, that in this general survey we can attach to the imputed offence, is a formal contravention of a statute. I will not say how criminal that may be. I will not say whether absolute, undeviating, inflexible, perfect obedience to every law of the land may not be exacted under the penalty of death from everybody holding public station. That is matter of judgment for legislators; but nevertheless the morality, the policy, the quality of the transaction cannot be otherwise affected than so far as the actual punishments of the statute are made applicable. When you consider that this new law, thus passed, really "reverses the whole action of this government," in the language of senators and representatives who spoke in its behalf during its passage; that, in the language of the same debaters, it "revolutionizes the practice of the government;" and when you consider that the only person in the United States that this law, in respect to the removal from office, was intended to, or by its terms could, affect, was the President of the United States; that nobody else was subject to the law; that it was made a rule, a control, a restraint, a mandate, a direction to nobody else in the United States except the President, just as distinctly as if it had said in its terms, "If the President of the United States shall remove from office he shall be punished by fine and imprisonment;" and when you know that, by at least de-

bated and disputed contests, it was claimed that the President of the United States had the right to remove, and that an inhibition upon that right was a direct assertion of congressional authority aimed at the President in his public trust, duty, and authority of carrying on the Executive Government, you can then at once see that by a necessary exclusion and conclusion, however much the act may have been against the law in fact, as on subsequent judgment may be held by this or any other court, yet it was an act of that nature, forbidden under those circumstances, and to be attempted under those obligations of duty, if attempted at all, which gave it this quality, and you see at once that no rhetoric, that no argument, that no politics whatever can fix upon the offence, completed or attempted, any other quality than this: a violation of a law, if it shall be so held, in support of and in obedience to the higher obligation of the Constitution. Whenever anybody puts himself in that position, nobody can make a crime of it in the moral judgment, in the judicial determination. In sentence and measure of punishment, at least, if not in formal decision and judgment, no man can make a crime of it.

We are treated to the most extraordinary view on the subject of violating what is called an unconstitutional law. Why, nobody ever violates an unconstitutional law, because there never is any such obstacle to a man's action, freedom, duty, right, as an unconstitutional law. The question is whether he violates law, not whether he violates a written paper published in a statute-book, but whether he violates law; and the first lessons under a written Constitution are and must be that a law unconstitutional is no law at all. The learned manager, Mr. Boutwell, speaks of a law being, possibly, he says, capable of being annulled by the judgment of the Supreme Court. Why, the Supreme Court never annuls a law. There is not any difference in the binding force of the law after the Supreme Court has annulled it, as

he calls it, from what there was before. The Supreme Court has no political function; it has no authority of will or power to annul a law. It has the faculty of judgment, to discern what the law is, and what it always has been, and so to declare it.

Apply it to an indictment under this very statute, and supposing the law is unconstitutional, for the purpose of argument, what is the result? Is the man to be punished because he has violated the law, and the Supreme Court has not as yet declared it unconstitutional? No; he comes into court and says, "I have violated no law." The statute is read; the Constitution is read; and the judge says, "You have violated no law." That is the end of the matter; and he does not want to appeal to the discretion of the Court in the measure of punishment, or to the mercy of the Executive in the matter of pardon. He has done what was right, and he needs to make no apology to Congress or anybody else, and Congress, in so far as it has not protected the public servant, rather owes an apology to him. I shall consider this matter more fully hereafter; and now look at it only in the view of fixing such reduced, and necessarily reduced, estimate of the criminality imputed, as makes it impossible that this should be an impeachable offence.

Much has been said about the duty of the people to obey and of officers to execute unconstitutional laws. I claim for the President no greater right, in respect to a law that operates upon him in his public duty, and upon him exclusively, to raise a question under the Constitution, to determine what his right and what his duty is, than I claim for every citizen in his private capacity when a law infringes upon his constitutional and civil and personal rights; for to say that Congress has no right to pass unconstitutional laws and yet that everybody is to obey them, just as if they were constitutional, and to be punished for breaking them, just as if they were constitutional, and to be prevented from

raising the question whether they are constitutional, by penal inflictions that are to fall upon them, whether they succeed in proving them unconstitutional or not, is, of course, trampling the Constitution, and its defence of those who obey it, in the dust. Who will obey the Constitution, as against an act of Congress that invades it, if the act of Congress with the sword of its justice can cut off his head and the Constitution has no power to save him, and nothing but debate hereafter as to whether he was properly punished or not? The gentlemen neglect the first, the necessary conditions of all constitutional government, when they press upon us arguments of this nature.

But again, the form alleged of infraction of this law, whether it was constitutional or unconstitutional, is not such as to bring any person within any imputation, I will not say of formal infraction of the law, but of any violent, wilful use and extent of resistance to, or contempt of, the law. Nothing was done whatever but to issue a paper and have it delivered, which puts the posture of the thing in this condition and nothing else: the Constitution, we will suppose, says that the President has a right to remove the Secretary of War; the act of Congress says the President shall not remove the Secretary of War; the President says, "I will issue an official order which will raise the same question between my conduct and the statute that the statute raises between itself and the Constitution." As there is not, and cannot be, and never should be, a reference of a law abstractly to the revision and determination of the Supreme Court, or of any other court, which would be making it a council of revision and of superior and paramount political and legislative authority, so when the Constitution and a law are, or are supposed to be, at variance and inconsistent, everybody upon whose right this inconsistency intrudes has a right, under the usual ethical conditions of conduct of good citizenship, to put himself in a position to act under the Constitution and not under

the law. And thus the President of the United States, as it is all on paper thus far—the Constitution is on paper, the law is on paper—issues an order on paper, which is but an assertion of the Constitution and a denial of the law, and that paper has legal validity if the Constitution sustains it, and is legally invalid and ineffectual, a mere *imbelle telum*, if the law prohibits it and the law is conformed to the Constitution. Therefore it appears that nothing was done but the mere course and process of the exercise of right claimed under the Constitution without force, without violence, and making nothing but the attitude, the assertion which, if questioned, might raise the point for judicial determination.

Now, Senators, you are not, you cannot be, unfamiliar with the principle of our criminal law, the good sense, the common justice of which, although it sometimes is pushed to extremes, approves itself to every honest mind, that criminal punishments, under any form of statute definitions of crime, shall never be made to operate upon acts, even of force and violence, that are, or honestly may be believed to be, done under a claim of right. It is for this purpose that the *animus*, the intent, the *animus furandi* in case of larceny, the malice prepense in a case of murder, the intent necessary in every crime, is made the very substance of the crime, and nothing is felt to be more oppressive, and nothing has fewer precedents in the history of our legislation or of our judicial decisions, than any attempt to coerce the assertion of peaceable and civil claims of right by penal enactments. It is for that reason that our communities and our law-givers have always frowned upon any attempt to coerce the right of appeal under any restrictions or any penalties of costs of a character oppressive. Civil rights are rights valuable and practical, just according as people can avail themselves of them, they keeping the peace; and the moment you put the coercion of punishment upon the assertion of a right, a

claimed right, in a manner not violating the peace and not touching the public safety, you infringe one of the necessary liberties of every citizen.

Although I confess that I feel great reluctance, and it is contrary to my own taste and judgment very much to mingle what is but a low level of illustration and argument with so grave and general a subject as determining the dimensions and qualities of an impeachable offence, yet, on the other hand, day after day it is pressed upon you that a formal violation of a statute, although made under the claim of a constitutional right and duty, honestly felt and possessed by the President, is nevertheless a ground of impeachment, not to be impeded or prevented by any of these considerations; and hence I am induced to ask your attention to what is but an illustration of the general principle, that penal laws shall not be enforced in regard to an intent which is governed by a claim of right. And this singular case occurred: a poacher who had set his wires within the domain of a lord of the manor had caught a pheasant in his wires; the gamekeeper took possession of the wires and of the dead pheasant, and then the poacher approaches him by threats of violence, which would amount to robbery, not larceny, takes from him the wires and the dead pheasant, and the poacher situated in that way on another's dominions, and thus putting himself in a condition where the humanity of the law can hardly reach and protect him, is brought into question and tried for robbery; and Vaughan, Baron, says:

If the prisoner demanded the wires under the honest impression that he had a right to them, though he might be liable to a trespass in setting them it would not be a robbery. The gamekeeper had a right to take them, and when so taken they never could have been recovered from him by the prisoner; yet, still, if the prisoner acted under the honest belief that the property in them continued in himself, I think it is not a robbery. If, however, he used it merely as a pretense, it would be robbery. The question for the jury is,

whether the prisoner did honestly believe he had a property in the snares and pheasant or not. (1 Russell on Crimes, 872.)

Thus does the criminal law of a free people distinguish between technical and actual fault; and what mean the guarantees of the Constitution, and what mean the principles and the habits of English liberty, that will not allow anybody enjoying those liberties to be drawn into question criminally upon any technical or formal view of the law to be administered by hide-bound authority or judges established and devoted to the prosecution of crime; what mean those fundamental provisions of our liberty, that no man shall be put on trial on an accusation of crime, though formally committed, unless the grand jury shall choose to bring him under inculpation, and that when thus brought under inculpation, he shall not be condemned by any judge or magistrate, but the warm and living condemnation of his peers shall be added to the judicial determination, or he shall go free? Surely we have not forgotten our rights and our liberties, and upon what they rest, that we should bring a President of the United States under a formal apparatus of iron operation, that by necessity, if you set it agoing, shall, without crime, without fault, without turpitude, without moral fault even of violating a statute that he believed to be a statute binding upon him, bring about this monstrous conclusion—I do not mean in any condemnation of it, but monstrous in its dimensions—of depriving him of his office and the people of the country of an executive head.

#### RECESS OF THE COURT

I am quite amazed, Mr. Chief Justice and Senators, at the manner in which these learned managers are disposed to bear down upon people that obey the Constitution to the neglect or avoidance of a law. It is the commonest duty of the profession to advise, it is the commonest duty of the profession to maintain and defend, the violation

of a law in obedience to the Constitution; and in the case of an officer whose duty is ministerial, whose whole obligation in his official capacity is to execute or to give free course to a law, even when the law does not bear at all upon him or his rights, the officer may appeal to the Courts if he acts in good faith and for the purpose of the public service, and with a view of ascertaining by the ultimate tribunal in season to prevent public mischiefs, whether the Constitution or the law is to be the rule of his conduct, and whether they be at variance.

Let me ask your attention to a case in Selden's Reports in the New York Court of Appeals (3 Selden page 9), the case of Newell, the auditor of the canal department, in error, against the people. The Constitution of the State of New York contains provisions restrictive upon the capacity or power of the legislature to incur public debt. The legislature, deeming it, however, within its right to raise money for the completion of the canals upon a pledge of the canals and their revenues, not including what may be called the personal obligation of the State, a dry mortgage as it were, not involving debt, but only carrying the pledge, undertook to, and did, raise a loan of \$6,000,000. Mr. Newell, the canal auditor, when a draft was drawn upon him in his official capacity, which it became him as a ministerial officer, obedient to the law, to honor and proceed upon, refused it honor, and raised the question whether this act was constitutional. Well, now, he ought to have been impeached! He ought to have had the senate and the court of appeals of New York convened on him and been removed from office! The idea of a canal auditor setting himself up against what the learned manager calls law! He set himself up in favor of law and against its contravention, and the question was carried through the Supreme Court of that State, and that Court decided that the law was constitutional, but upon an appeal to the court of appeals that court held it unconsti-



tutional, and the \$6,000,000 loan was rolled away as a scroll, needing to be fortified by an indemnifying proceeding amending the constitution and extending its provisions.

Now, I should like to know if the President of the United States, who has taken an oath to preserve, protect, and defend the Constitution in reference to a law that is made over his head and on his right, and over and on nothing else in this nation, cannot appeal to the Constitution? And when he does make the appeal is the Constitution to answer him, through the House of Representatives, "We admit, for argument, that the law is unconstitutional; we admit it operates on you and your trust-right, and nothing else; we admit that you were going to raise the constitutional question, and yet the process of impeachment is the peril under which you do that, and its axe is to cut off your head for questioning an unconstitutional law that operates upon your right and contravenes that Constitution which you have sworn to protect and defend in every department of the government, on and for the legislature, on and for the judiciary, on and for the people, on and for the executive power"? How will our learned managers dispose of this case of Newell, the auditor, against the people of the State of New York—a worthy, an upright, a useful, a prosperous assertion in the common interest and for the maintenance of the constitution, of a duty to the people?

And are we such bad citizens when we advise that the Constitution of the United States may be upheld, and that anybody, without a breach of the peace and in an honest purpose, may make a case that the instance may be given whereby the judgment of the Court may be had and the Constitution saved from violation? Not long since the State of New York passed a law levying a tax on brokerage sales in the city of New York of a half or three-fourths per cent. on all goods that should be sold by brokers, seeking to raise for the revenue purposes of the State of New York about ten

million dollars on the brokers' sales of merchandise, which sales distribute through the operations of that emporium the commerce of the whole country for consumption through all the States in the Union. Your sugar, your tea, your coffee that you consume in the valley of the Mississippi was to be made to pay a tax in the city of New York to support the State of New York in its government by that tax; and they made it penal for any broker to sell without giving a bond and paying the tax. Was it very wicked for me, when all the brokers were in this distress, to advise them that the shortest way to settle that matter was not to give the bond? And when one of them, one of the most respectable citizens of the city, was indicted by the grand jury for selling coffee without giving a bond, and it came before the Courts, instead of having, as I supposed when I gave my advice, to come up to the Supreme Court of the United States to vindicate the Constitution of the United States, I had the good fortune to succeed in the Court of Appeals of the State of New York itself, that court holding that the law was unconstitutional, and the indictment failed. Was I a bad citizen for saving the Constitution of the United States against these infractions of law? Was the defendant in the indictments a bad citizen for undertaking to obey the Constitution of the United States? Where are your constitutional decisions—*McCulloch vs. Maryland*; *Brown vs. Maryland*; the bank-tax cases—all these instances by which a constitution is arrayed for the protection of the rights which it secures? It is always by instances, it is always by acts; and the only ethical condition is that it shall be done without a breach of the peace and in good faith.

How is it with people in office that violate, sometimes, the law? Is it true that they must necessarily be punished for it? Mr. Lincoln, before the "invasion" or "insurrection" broke out, had raised the case of the Constitution for the suspension of the *habeas corpus*, undertook to arrest a mis-

chief that was going on at Key West, where, through the forms of peace, an attack was made upon the Government fort there through the *habeas corpus*. An excellent way to take a fort! I do not know whether the honorable manager [Mr. Butler], who is so good a lawyer, tried that in all his military experience or not, but the *habeas corpus* was resorted to down in Florida to empty that fort of all its soldiers, and was succeeding admirably. A judge issued the *habeas corpus*; the soldier was brought out, and then he was free; and so the fort would have been taken by *habeas corpus*. President Lincoln suspended the *habeas corpus*, violating the law, violating the Constitution. Should he have been impeached? Is it necessary that a man should be impeached? What did he do? He suspended it by proclamation of the 10th of May, 1861, to be found in volume twelve Statutes at Large, page 1260; and at the opening of the next session he referred to the fact that the legality of the measures was questioned, and said they were ventured upon under a public necessity, and submitted to the judgment of Congress whether there should be legislation or not. That is found on pages 12 and 13 of the Senate Journal, first session thirty-seventh Congress, 1861.

There were various other acts of this great, heroic, good President—the arrest of the members of the legislature of Maryland, never justified by any law or any constitution that I know of, but wholly justified by duty to the country. And it so happens, what every statesman knows as the experience of government, that public action is to be judged by public men and public officers as private actions are to be judged by private men, according to the quality of the act, whether it shall be impeached or whether it shall be indemnified.

I do not seek this argument as going further than to meet the necessity which I understand these learned managers put forth that an infraction of a statute must carry out of

office any President of the United States who is so guilty. Why, the very next statute in the book before me, after the civil-office-tenure act, on page 232 of the volume, is an act to declare valid and conclusive certain proclamations of the President and acts done in pursuance thereof, or of his orders, for the suppression of the late rebellion against the United States. The military commissions had been declared invalid by the Supreme Court, and we have an act of indemnity covering a multitude of formal, technical sins by indemnity and protection to have the same effect as if the law had been passed before they were performed. So, therefore, this dry, dead interpretation of law and duty by which act, unqualified, unscrutinized, unweighed, unmeasured, is to form the basis of necessary action of the guillotine of impeachment, disappears wholly under the clear, bright, and honest light which true statesmanship sheds upon the subject.

I may as conveniently at this point of the argument as at any other pay some attention to the astronomical punishment which the learned and honorable manager, Mr. Boutwell, thinks should be applied to this novel case of impeachment of the President.\*

\* At the close of Mr. Boutwell's argument is the following extravagantly rhetorical passage:

Travellers and astronomers inform us that in the southern heavens, near the southern cross, there is a vast space which the uneducated call the hole in the sky, where the eye of man, with the aid of the powers of the telescope, has been unable to discover nebulae, or asteroid, or comet, or planet, or star, or sun. In that dreary, cold, dark region of space, which is only known to be less than infinite by the evidences of creation elsewhere the Great Author of celestial mechanism has left the chaos which was in the beginning. If this earth were capable of the sentiments and emotions of justice and virtue, which in human mortal beings are the evidences and the pledge of our Divine origin and immortal destiny, it would heave and throw, with the energy of the elemental forces of nature, and project this enemy of two races of men into that vast region, there forever to exist in a solitude eternal as life, or as the absence of life, emblematical of, if not really, that "outer darkness" of which the Savior of man spoke in warning to those who are the enemies of themselves, of their race and of their God.

Cicero, I think it is, who says that a lawyer should know everything, for sooner or later there is no fact in history, in science, or of human knowledge that will not come into play in his arguments. Painfully sensible of my ignorance, being devoted to a profession which "sharpens and does not enlarge the mind" I yet can admire without envy the superior knowledge evinced by the honorable manager. Indeed, upon my soul, I believe he is aware of an astronomical fact which many professors of that science are wholly ignorant of. But nevertheless, while some of his honorable colleagues were paying attention to an unoccupied and unappropriated island on the surface of the seas, Mr. Manager Boutwell, more ambitious, had discovered an untenanted and unappropriated region in the skies, reserved, he would have us think, in the final councils of the Almighty, as the place of punishment for convicted and deposed American Presidents.

At first I thought that his mind had become so "enlarged" that it was not "sharp" enough to discover the Constitution had limited the punishment; but on reflection I saw that he was as legal and logical as he was ambitious and astronomical, for the Constitution has said "removal from office," and has put no limit to the distance of the removal so that it may be, without shedding a drop of his blood, or taking a penny of his property, or confining his limbs, instant removal from office and transportation to the skies. Truly, this is a great undertaking; and if the learned manager can only get over the obstacles of the laws of nature the Constitution will not stand in his way. He can contrive no method but that of a convulsion of the earth that shall project the deposed President to this infinitely distant space; but a shock of nature of so vast an energy and for so great a result on him might unsettle even the footing of the firm members of Congress. We certainly need not resort to so perilous a method as that. How shall we accomplish it?

Why, in the first place, nobody knows where that space is but the learned manager himself, and he is the necessary deputy to execute the judgment of the Court.

Let it then be provided that in case of your sentence of deposition and removal from office the honorable and astronomical manager shall take into his own hands the execution of the sentence. With the President made fast to his broad and strong shoulders, and, having already essayed the flight by imagination, better prepared than anybody else to execute it in form, taking the advantage of ladders as far as ladders will go to the top of this great Capitol, and spurning then with his foot the crest of Liberty, let him set out upon his flight while the two houses of Congress and all the people of the United States shall shout, "*Sic itur ad astra.*"

But here a distressing doubt strikes me; how will the manager get back. He will have got far beyond the reach of gravitation to restore him, and so ambitious a wing as his could never stoop to a downward flight. Indeed, as he passes through the constellations, that famous question of Carlyle by which he derides the littleness of human affairs upon the scale of the measure of the heavens, "What thinks Bœotes as he leads his hunting dogs up the zenith in their leash of sidereal fire?" will force itself on his notice. What, indeed, would Bœotes think of this new constellation?

Besides, reaching this space, beyond the power of Congress even "to send for persons and papers" how shall he return, and how decide in the contest, there become personal and perpetual, the struggle of strength between him and the President? In this new revolution, thus established forever, who shall decide which is the sun and which is the moon? Who determine the only scientific test—which reflects the hardest upon the other?

If I have been successful at all in determining the general latitude of the imputed offence as not bringing it, under the

circumstances which this evidence attaches to it, to the quality and grade of impeachable offences, I may now be prepared, and I hope with some commendable brevity, to notice what I yet regard as important to the course of my argument, and what I assigned as the second topic of it, to show that all else is political; but I wish to draw your attention also to what I think is a matter of great moment, a matter of great concern and influence for all statesmen, and for all lovers of the Constitution and of the country—to the particular circumstances under which the two departments of the Government now brought in controversy are placed. I speak not of persons, but of the actual constitutional possession of the two departments.

The office of President of the United States, in the view of the framers of the Constitution, and in the experience of our national history, and in the esteem of the people, and in the ambition of all who aspire to that great place by worthy means, is an office of great trust and power. It has great powers. They are not monarchical or tending to monarchy, because the tenure of the office, its source of original commission, and its return of the trust to those who control it, and its amenability under the Constitution to this process of impeachment and the authority of Congress, save it from being at all dangerous to the liberties of the nation. Yet it is, and is intended to be, an office of great authority, and the Constitution in its co-ordinate department cannot be sustained without maintaining all the authority that the Constitution has intended for this executive office. But it depends for its place in the Constitution upon the fact, the practical fact, that its authority is committed by the suffrage of the people, and that when this authority is exerted it is not by individual purpose or will, or upon the mere strength which a single individual can oppose to the collective power of the Congress of the United States. It is because and as the people, who by their suffrage have raised the President

to his place, are behind him, holding up his hands, speaking with his voice, sustaining him in his high duties, that the President has the place and can maintain it under the Constitution.

This great power is safe then to the people for the reasons I have stated, and it is safe to the President because the people are behind him and have just exhibited their confidence by the suffrage that has promoted him. When, however, alas, our Constitution comes to this trial that one is lifted to the presidential office who has not received the suffrage of the people for that office, then at once discord, dislocation, deficiency, difficulty show themselves; then at once the great powers of the office which were consonant with a free constitution and with the supremacy of popular will, by the fact that for a brief term the breath of life of the continuing favor of the people gave them efficacy and strength, find no support in fact. Then it is that in the criticisms of the press, in the estimates of public men, in the views of the people, these great powers, strictly in trust and within the Constitution, seem to be despotic and personal. And then, if we will give due force to another difficulty that our system of vicious politics has introduced, and that is that in the nomination for the two offices, selecting always the true leader of the popular sentiment of the time for the place of President, we look about for a candidate for the Vice-Presidency to attract minority and to assuage differences, and to bring in inconsistent support, and make him different from the President in political position and in general circumstances for popular support, and couple with the fact that I have spoken of in the Constitution, and which belongs to it, this vice in our politics, then when the Vice-President becomes President of the United States, not only is he in the attitude of not having the popular support for the great powers of the Constitution, but he is in the condition of not having the party support for the fidelity and main-



tenance of his authority that are necessary. Then, adhering to his original opinions, to the very opinions and political attitude which form the argument for placing him in the second place of authority, he is denounced as a traitor to his party, and is watched and criticised by all the leaders of that party.

I speak not particularly in reference to the present presidential term and its incumbent, and the actual condition of politics here; I speak of the very nature of the case. All the public men, all the ambitious men, nay, all the men interested in the public service, in carrying on the Government for the purposes and with the views, in the interest of duty, of the party, have made their connections, and formed their views, established their relations with the President who has disappeared. They then are not in the attitude of support, personal or political, that may properly be maintained among the leaders of a party, and that is implied in the fact that an election has taken place by the joint efforts, crowning in the final result the President of the selection of the people. Then it is that high words are interchanged. Then it is that ambitious men, who had framed their purposes, both for the present and for the future, upon the footing of the presidential predominance that had been secured by the election, find these plans dislocated and disturbed; and then it is that if wisdom and prudence and the personal qualities of pacification and of accommodation and of attraction are wanting upon the one side and the other, terrible evils threaten the conduct of the Government and the peace of the State. It was thus, as we all know by looking back to the experience of the whig party, that differences, even in times of peace and of quiet, had been urged so far in the presidency of Mr. Tyler, that an impeachment was moved against him in the House of Representatives, and had more than one hundred supporters; and yet when it was all over, nobody, I think, could have dreamed that there

was anything in the conduct of Mr. Tyler, in the matter complained of, that was just ground for impeachment. So, too, in great part during the incumbency of Mr. Fillmore, elevated to the presidency, his action and his course, tempered and moderated as it was by some of the personal qualities that I have stated, was yet carried on in resistance to the leading ideas of the party that had raised him to power.

Then the opposition, seizing upon this opportunity, encourage the controversy, urge on the quarrel, but do not espouse it, and thus it ends in the President being left without the support of the currents of authority that underlie and vivify the Constitution of the United States—the favor of the people; and so when this unfortunate, this irregular condition of the executive office concurs with times of great national juncture, of great and serious oppression and difficulty of public affairs, then at once you have at work the special, the peculiar, the irregular operation of forces that expose the Constitution, left unprotected and undefended with the full measure of support that every department of the Government should have to resist the other, pressing on to dangers and to difficulties that may shake and bring down the pillars of the Constitution itself.

I suggest this to you as wise men, to understand how out of circumstances, for which no man is responsible, attributable to the working of the Constitution itself, in this effort to provide a successor, and to the inattention paid to it in the suffrages of the people and the selections of the politicians, how there is a weakness, and a special weakness, that the presidency is, as it were, an undefended fort, and see to it that the invasion is not urged and made successful by the temptation thus presented.

This exception, weakness of the presidency under our Constitution, is encountered in the present state of affairs by an extraordinary development of party strength in the Congress. There are in the Constitution but three barriers

against the will of a majority of Congress within the scope of their authority. One is that it requires a two-thirds vote to expel a member of either house; another that a two-thirds vote is necessary to pass a law over the objections of the President; and another, that a two-thirds vote of the Senate, sitting as a court for the trial of impeachment, is requisite to a sentence. And now how have these two last protections of the executive office disappeared from the Constitution in its practical working by the condition of parties that has given to one the firm possession by a three-fourths vote, I think in both houses, of the control of the action of each body of the legislature? Reflect upon this. I do not touch upon the particular circumstance that the non-restoration of the southern States has left your numbers in both houses of Congress less than they might under other circumstances be. I do not calculate whether that absence diminishes or increases the disproportion that there would be. Possibly their presence might even aggravate the political majority which is thus arrayed and thus overrides practically all the calculations of the presidential protection through the guarantees of the Constitution; for, what do the two-thirds provisions mean? They meant that in a free country, where elections were diffused over a vast area, no congressman having a constituency of over seventy or eighty thousand people, it was impossible to suppose that there would not be a somewhat equal division of parties, or impossible to suppose that the excitements and zeal of party could carry all the members of it into any extravagance. I do not call them extravagances in any sense of reproach; I merely speak of them as the extreme measures that parties in politics, and under whatever motives, may be disposed to adopt.

Certainly, then, there is ground to pause and consider, before you bring to a determination this great struggle between the co-ordinate branches of the Government, this agitation and this conclusion in a certain event of the ques-

tion whether the co-ordination of the Constitution can be preserved. Attend to these special circumstances and determine for yourselves whether under these influences it is best to urge a contest which must operate upon the framework of the Constitution, and its future, unattended by any exceptions of a peculiar nature that govern the actual situation. Ah, that is the misery of human affairs, that the stress comes and has its consequence when the system is least prepared to receive it. It is the misery that disease, casual, circumstantial, invades the frame when health is depressed and the powers of the constitution to resist it are at the lowest ebb. It is that the gale rises and sweeps the ship to destruction when there is no sea-room for it and when it is upon a lee-shore. And if concurrent with that danger to the good ship her crew be short, her helm unsettled, and disorder begins to prevail, there comes to be a final struggle for the maintenance of mastery against the elements and over the only chances of safety, how wretched is the condition of that people whose fortunes are embarked in that ship of state!

What other protection is there for the presidential office than these two-thirds guarantees of the Constitution that have disappeared? The Supreme Court placed there to determine, among the remarkable provinces of its jurisdiction, the lines of separation and of duty and of power under our Constitution between the legislature and the President. Ah! under this evidence, received and rejected, the very effort of the President was, when the two-thirds majorities had urged the contest against him, to raise a case for the Supreme Court to decide; and then the legislature, coming in by its special condition of impeachment, intercepts the effort, and brings his head again within the mere power of Congress, where the two-thirds rule is equally ineffectual as between the parties to the contest.

This is matter of grave import, of necessary consideration,

and which, with the people of this country, with watchful foreign nations, and in the eyes of history, will be one of the determining features of this great controversy; for great as is the question in the estimate of the managers or of ourselves or of the public intelligence of this people, of how great the power should be on one side or the other, with Congress or with the President, that question sinks into absolute insignificance compared with the greater and higher question, the question that has been in the Constitution, that has been in the minds of philosophers, of publicists, and of statesmen since it was founded, whether it was in the power of a written constitution to draw lines of separation and put up buttresses of defence between the co-ordinate branches of the Government? And with that question settled adversely with a determination that one can devour, and having the power, will devour the other, then the balances of the American Constitution are lost and lost forever. Nobody can reinstate in paper what has once been struck down in fact. Mankind are governed by instances, not by resolutions.

And then, indeed, there is placed before the people of this country either despair at the theory of paper constitutions, which have been derided by many foreign statesmen, or else an attempt to establish new balances of power by which, the poise of the different departments being more firmly placed, one can be safe against the other. But who can be wiser than our fathers? Who can be juster than they? Who can be more considerate or more disinterested than they? And if their descendants have not the virtue to maintain what they so wisely and so nobly established, how can these same descendants hope to have the virtue and the wisdom to make a better establishment for their posterity?

Nay, Senators, I urge upon you to consider whether you will not recoil from settling so tremendous a subject under so special, so disadvantageous, so disastrous circumstances as I have portrayed to you in the particular situation of

these branches of the Government. A stronger Executive, with an absolute veto, with a longer term, with more permanent possession and control of official patronage, will be necessary for the support of this executive department, if the wise and just and considerate measure of our ancestors shall not prove, in your judgment, sufficient; or, if that be distasteful, if that be unacceptable, if that be inadmissible, then we must swing it all over into the omnipotence of Congress, and recur to the exploded experiment of the confederation, where Congress was executive and legislative, all in one.

There is one other general topic, not to be left unnoticed for the very serious impression that it brings upon the political situation which forms the staple—I must say it—of the pressure on the part of the managers to make out a crime, a fault, a danger that should enlist your action in the terrible machinery of impeachment and condemnation. I mean the very peculiar political situation in the country itself and in the administration of this Government over the people of the country, which has been the womb from which has sprung this disorder and conflict between the departments of the government. I can, I think, be quite brief about it, and certainly shall not infringe upon any of the political proprieties of the occasion.

The suppression of an armed rebellion and the reduction of the revolted States to the power of the Government, when the region and the population embraced in the rebellion were so vast, and the head to which the revolt had come was so great, and the resistance so continuous, left a problem of as great difficulty in human affairs as was ever proposed to the actions of any government. The work of pacification would have been a severe task for any government after so great a struggle, when so great passions were enlisted, when so great wounds had been inflicted, when so great discontents had urged the controversy, and so much bitterness had sur-

vived its formal settlement; but wonderful to say, with this situation, so difficult as to surpass almost the powers of government as exhibited in any former instance in the history of the world, there occurred a special circumstance that by itself would have tasked all the resources of statesmanship under even a simple government. I mean the emancipation of the slaves, which had thrown four millions of human beings, not by the processes of peace, but by the sudden blow of war, into the possession of their freedom, which had changed at once, against their will, the relation of all the rest of the population to these men that had been their slaves.

The process of adaptation of society and of law to so grave a social change as that, even when accomplished in peace, and when not disturbed by the operations of war and by the discontents of a suppressed rebellion, are as much as any wisdom or any courage, or any prosperity that is given to government, can expect to ride through in safety and peace. When, then, these two great political facts concur and press upon the Government that is responsible for their conduct, how vast, how difficult, how intractable and unmanageable seems the posture!

But this does not represent the measure or even the principal feature of the difficulty. When the government, whose arms have triumphed and suppressed resistance is itself, by the theory and action of the Constitution, the government that, by peaceful law, is to maintain its authority, the process is simple; but under our complex Government, according to the theory and the practice, the interests and the feelings, the restored Constitution surrenders their domestic affairs at once to the local governments of the people who have been in rebellion. And then arises what has formed the staple of our politics for the last four years, what has tried the theory, the wisdom, the courage, the patriotism of all. It is, how far, under the Constitution as it stands, the General

Government can exercise absolute control in the transition period between war and absolute, restored peace, and how much found to be thus unmanageable shall be committed to changes of the Constitution. And when we understand that the great controversy in the formation of the Constitution itself was how far the General Government should be intrusted with domestic concerns, and when the final triumph and the general features of the Constitution that the people of the States were not willing, in the language of Mr. Ellsworth, to intrust the General Government with their domestic interests, we see at once how wide, how dangerous, how difficult the arena of controversy, of constitutional law and of difference of opinion as to what was or is constitutional, and if it be not, of what changes shall be or ought to be made in the Constitution to meet the practical situation.

Then when you add to this that as people divide on these questions, and as the practical forces on one side and the other are the loyal masses and the rebel masses, whoever divides from his neighbor, from his associate, from his party adherents in that line of constitutional opinion and in that line of governmental action, which seems to press least changes upon the Constitution and least control upon the masses lately in rebellion, will be suspected and charged and named and called an ally of traitors and rebels, you have at once disclosed how our dangerous politics have been brought to the head in which these names of "traitor" and of "rebel," which belong to war, have been made the current phrases of political discussion.

I do not question the rectitude nor do I question the wisdom of any positions that have been taken as matter of argument or as matter of faith or as matter of action in the disposition of this peculiar situation. I only attract your attention to the necessities and dangers of the situation itself. We were in the condition in which the question of the surrender to the local communities of their domestic



affairs, which the order of the Constitution had arranged for the peaceful situation, became impossible without the gravest dangers to the State, both in respect to the public order and in respect to this changed condition of the slave.

In English history the Commons were urged, after they had rejected the king from the British constitution and found the difficulty of making things work smoothly, *stare supra antiquas vias*; but, said Sergeant Maynard, "It is not the question of standing upon the ancient ways, for we are not on them." The problem of the Constitution is, as it was then, how to get upon the ancient ways from these paths that disorder and violence and rebellion had forced us into; and here it was that the exasperations and the exacerbations of politics came up mingling with charges of infidelity to party and with treason, moral treason, political treason, I suppose, to the state. How many theories did we have?

In this Senate, if I am not mistaken, one very influential and able and eloquent senator was disposed to press the doctrines of the Declaration of Independence into being working forces of our constituted liberty, and a sort of pre-constitutional theory was adopted to suit the logical and political difficulties of the case. In another House a great leader was disposed to put it upon the trans-constitutional necessities that the situation itself imposed in perfect peace as in absolute and flagrant war. And thus it was that minds trained in the old school, attached to the Constitution, unable as rhetoricians or as reasoners to adopt these learned phrases and these working theories of preconstitutional or trans-constitutional authority and obligation, were puzzled among the ruins of society that the war had produced; and thus, as it seems to me, we find these concurring dangers leading ever to an important and necessary recognition, by whoever has to deal with them, of the actual and practical influences that they have upon the controversy.

And now let me urge here that all this is within the prov-

ince of politics; and a free people are unworthy of their freedom and cannot maintain it if their public men, their chosen servants, are not able to draw distinctions between legal and constitutional offence and odious or even abominable politics. Certainly it is so. *Idem sentire de republicâ*, to agree in opinion concerning the public interest is the bond of one party, and diversity from those opinions the bond of the other; and where passions and struggles of force in any form of violence or of impeachment as an engine of power come into play, then freedom has become license, and then party has become faction, and those who do not withhold their hand until the ruin is accomplished will be subject to that judgment that temperance and fortitude and patience were not the adequate qualities for their conduct in the situation in which they were placed. Oh, why not wise enough to stay the pressure till adverse circumstances shall not weigh down the state? Why not in time remember the political wisdom—

Beware of desperate steps. The darkest day,  
Live till to-morrow, will have passed away.

I hold in my hand an article from the *Tribune*, written under the instructions of this trial and put with great force and skill. I do not propose to read it. I bring it here to show and to say that it is an excellent series of articles of impeachment against the President of the United States within the forum of politics for political repugnancy and obstruction, and an honest confession that the technical and formal crimes included in these articles are of very paltry consideration. That is an excellent article of impeachment, demanding by process suitable to the forum, an answer; and for the discussions of the hustings and of the election, there it belongs; there it must be kept. But this being a Court, we are not to be tried for that in which we are not inculpated. How wretched the condition of him who

is to be thus oppressed by a vague, uncertain shadow which he cannot oppose or resist! If the honorable managers will go back to the source of their authority, if they will obtain what was once denied them, a general and open political charge, it may, for aught I know, be maintainable in law; it may be maintainable in fact; but then it would be brought here; it would be written down; its dimensions would be known and understood; its weight would be estimated; the answer could be made.

And then your leisure and that of the nation being occupied with hearing witnesses about political differences and the question of political repugnance and obstructions upon the side of the President, those who should be honored with his defence in that political trial would at least have the opportunity of reducing the force of the testimony against them, and of bringing opposing and contravening proofs; and then, at least, if you would have a political trial, you would have it with name and with substance to rest upon. But the idea that a President of the United States is to be brought into the procedure of this Court by a limited accusation, found "not guilty" under that, and convicted on an indictment that the House refused to sustain, or upon that wider indictment of the newspaper press, and without an opportunity to bring proof or to make arguments on the subject, seems to us too monstrous for any intelligence within or without this political circle, this arena of controversy, to maintain for a moment.

I may hope, somewhat briefly, to draw your attention to what lies at the basis of the discussion of the power and authority that may be rightfully exercised or reasonably be assumed in the action of the President to be exercised, even if it should prove erroneous within the premises of this matter between the two branches of the Government.

The co-ordination of the powers of government is not only the greatest effort in the frame of a written constitution, but

I think it must be conceded that as it occupies the main portion of the Constitution itself, so it has been regarded by all competent critics, at home and abroad, to have been a work most successfully accomplished by the framers of our Government. Indeed, if you will look at the Constitution, you will find that beyond that very limited though very important service, of dividing what belongs to government and what shall be left to the liberties of the people, and then discriminating between what shall be accorded to the general government and what shall be left to the domestic governments of the States, the whole service of the Constitution is to build up these three departments of the Government so that they shall have strength to stand as against the others, and not strength to encroach or overthrow.

Much has been said about Congress as being the great repository of power. Why, of course it is. It is the repository of power and of will, and there is no difficulty in making Congress strong enough. Congress, that must be intrusted with all the strings of power and furnished with all its resources, the effort of the Constitution is to curb and restrain; and so you will find that almost all the inhibitions of the Constitution are placed upon Congress—upon Congress in withholding it from power over the people; upon Congress in withholding it from power over the States; upon Congress in withholding it from power over the co-ordinate branches; and, nevertheless, by a necessary and absolute deposit of authority in Congress, it is left master of the whole. This power of Parliament in the British constitution makes the Commons masters of the Government. To what purpose is it to provide that the justices of the Supreme Court shall hold their tenure for life, and that their salaries shall not be diminished during the term of their service, when Congress, by an undoubted constitutional power, may omit and refuse to appropriate one dollar to the support of any particular justice during any particular year or series of years? Never-

theless, the Government is to be administered by men, and in an elective government the trust is that the selected agents of the people will be faithful to their interest and will be endowed with sufficient intelligence to protect them.

But simple as is the constitution of the judiciary, and needing no care, when you come to the executive authority, arises the problem which has puzzled, does puzzle, will puzzle all framers of government having no source and no ideas of authority, except what springs from the elective suffrage. You have the balance of the British constitution between the Crown and the Parliament, because it rests upon ideas and traditions and experience which have framed one portion of the Government as springing up from the people and in their right, and the other portion of the Government as descending from Divine authority and in its right; and you have no difficulty in enlarging, confirming, and bracing up the authority of Parliament, provided you leave standing the authority and majesty of the throne. But here the problem is, how, without the support of nobility, of the fountain of honor, of time, of strength, of inheritance, how under a suffrage and for a brief period to make an executive that is strong enough to maintain itself against the contentions of the Constitution.

Under these circumstances, and adjusting the balance as it is found in the Constitution, our ancestors disposed of the question. It has served us to this time. Sometimes, in the heat of party, the Executive has seemed too strong; sometimes, in the heat of party, Congress has seemed too strong; yet every contest and every danger passes away, managed, administered, controlled, protected by the great, superior, predominant interest and power of the people themselves. And the essence of the Constitution is, that there is no period granted by it of authority to the Senate in their six years' term, to the President in his four years' term, to the House of Representatives in their two years'

term, no period that cannot be lived through in patience subordinate and obedient to the Constitution; and that, as was said in the debate which I read from the convention, applied to the particular topic of impeachment, there will be no danger when a four years' recurring election restores to the common master of Congress and the Executive the trust reposed, that there will be a temptation to carry, for political controversy and upon political offence, the sword of the Constitution, and make it peremptory and final in the destruction of the office.

I beg leave, in connection with this subject, its delicacy, its solitudes in the arrangement of constitutional power, to read two passages from a great statesman, whose words when he was alive were as good as anybody's, and since his death have not lost their wisdom with his countrymen; I mean Mr. Webster. In his debate upon the Panama mission he said, in speaking of the question of the confidence of Congress in the Executive:

This seems a singular notion of confidence, and certainly is not my notion of that confidence which the Constitution requires one branch of the government to repose in another. The President is not our agent, but, like ourselves, the agent of the people. They have trusted to his hands the proper duties of his office; and we are not to take those duties out of his hands from any opinion of our own that we should execute them better ourselves. The confidence which is due from us to the Executive and from the Executive to us is not personal, but official and constitutional. It has nothing to do with individual likings or dislikings: but results from that division of power among departments and those limitations on the authority of each which belong to the nature and frame of our Government. It would be unfortunate, indeed, if our line of constitutional action were to vibrate backward and forward according to our opinions of persons, swerving this way to-day from undue attachment, and the other way to-morrow from distrust or dislike. This may sometimes happen from the weakness of our virtues or the excitement of our passions; but I

trust it will not be coolly recommended to us as the rightful course of public conduct. (Webster's Works, vol. 3, p. 187.)

Again, in his speech on the presidential protest in the Senate in 1834, he said:

The first object of a free people is the preservation of their liberty, and liberty is only to be preserved by maintaining constitutional restraints and just division of political power. Nothing is more deceptive or more dangerous than the pretence of a desire to simplify government. The simplest governments are despotisms; the next simplest, limited monarchies; but all republics, all governments of law, must impose numerous limitations and qualifications of authority and give many positive and many qualified rights. In other words, they must be subject to rule and regulation. This is the very essence of free political institutions. The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it entrenches itself behind strong defences, and fortifies itself with all possible care against the assaults of ambition and passion. It does not trust the amiable weaknesses of human nature, and, therefore, it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it. Neither does it satisfy itself with flashy and temporary resistance to illegal authority. Far otherwise. It seeks for duration and permanence; it looks before and after; and, building on the experience of ages which are past, it labors diligently for the benefit of ages to come. This is the nature of constitutional liberty; and this is our liberty, if we will rightly understand and preserve it. Every free government is necessarily complicated because all such governments establish restraints, as well on the power of government itself as on that of individuals. If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials, and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we will place the executive power in the same hands, we may readily simplify government. We may easily

bring it to the simplest of all possible forms, a pure despotism. But a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions; and, doubtless, the continuance of regulated liberty depends on maintaining these boundaries. (Webster's Works, vol. 4, p. 122.)

I think I need to add nothing to these wise, these discriminating, these absolute and peremptory instructions of this distinguished statesman. The difficulty and the danger are exactly where this government now finds them, in the withholding of the strength of one department from working the ruin of another.

THIRD DAY, APRIL 30, 1868

Mr. EVARTS. We perceive, then, Mr. Chief Justice and Senators, that the subject out of which this controversy has arisen between the two branches of the Government, executive and legislative, touches the very foundations of the balanced powers of the Constitution; and in the arguments of the honorable managers it has to some extent been so pressed upon your attention. You have been made to believe that so weighty and important is the point in controversy as to the allocation of the power over office included in the function of removal, that if it is carried to the credit of the executive department of this Government it makes it a monarchy. Why, Mr. Chief Justice and Senators, what grave reproach is this upon the wisdom and foresight and civil prudence of our ancestors that have left unexamined and unexplored and unsatisfied these doubts or measures of the strength of the Executive as upon so severe a test or inquiry of being a monarchy or a free republic? I ask, without reading the whole of it, your attention to a passage from the Federalist, in one of the papers by Alexander Hamilton, who meets in advance these aspersions that were sought to be thrown upon the establishment of the executive power in



a President. He there suggests in brief and solid discriminations the distinctions between the Presidency and a monarchy, and concludes by saying this:

What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

But a little closer attention both to the history of the framing of the Constitution and to the opinions that maintained a contest in the body of the convention, which should finally determine the general character and nature of the Constitution, will show us that this matter of the power of removal or the control of office, as disputable between the Executive and the Senate, touches more nearly one of the other great balances of the Constitution; I mean that balance between the weight of numbers in the people and the equality of States, irrespective of population, of wealth, and of size. Here it is, if I may be allowed to say so, that the opinions to which my particular attention was drawn by the honorable manager [Mr. Boutwell], the opinions of Roger Sherman, had their origin. One of the most eminent statesmen of the last generation said to me that it was to Mr. Sherman and to his younger colleague, Mr. Ellsworth, and to Judge Paterson, of New Jersey, that we owed it, more than to all else in that convention, that our Government was made what the statesman pronounced it to be, the best government in the world, a federal republic, instead of being what it would have been but for those members of the convention, as this same statesman of the last generation expressed it, a consolidated empire, the worst government in the world.

Between these two opinions it was that the controversy

whether the Senate should be admitted into a share of the executive power of official appointment, the great arm and strength of the Government came into play; and as a part of his firm maintenance of the equality of the States, Mr. Sherman insisted that this participation should be accorded to the Senate; and others resisted as too great a subtraction from the sum of executive power to be capable safely of this distribution and frittering away. Mr. Adams, the first President of that name, I am informed upon authority not doubted, coming from the opinion of his grandson, died in the conviction that even the participation in appointment that the Constitution, as construed and maintained in the practice of this Government, accorded to the Senate would be the point upon which the Constitution would fail; that this attraction of power to comparatively irresponsible and unnoticed administration in the Senate would ultimately so destroy the strength of the Executive with the people and create so great discontent with the people themselves that the Executive of their own choice, upon the Federal forces and numbers which the Constitution gives to that election, would not submit to the executive power thus bestowed being given to a body that had its constitution without any popular election whatever, and had its members and strength made up not by the wealth and power and strength of the people, but by the equality of the States.

When you add to that this change which gives to the Senate a voice in the removal from office, and thus gives them the first hold upon the question of the maintenance of official power in the country, you change wholly the question of the Constitution; and instead of giving the Senate only the advisory force which that instrument commits to it, and only under the conditions that the office being to be filled they have nothing to say but who shall fill it, and if they do not concur, still leave it to the Executive to name another, and another, and another, always proceeding from his orig-

inal and principal motion in the matter, you change it to the absolute preliminary power of this body to say to the Executive of the United States that every administrative office under him shall remain as it is; and these officers shall be over him and against him, provided they be with and for you; and when you add to that the power to say "until we know and determine who the successor will be, until we get the first move by the Executive's concession to us of the successor, we hold the reins of power that the office shall not be vacated," you do indeed break down at once the balance between the executive and the legislative power as represented in this body of the latter department of the Government, and you break down the Federal election of President at once, and commit to the equality of States the partition and distribution of the executive power of this country.

I would like to know how it is that the people of this country are to be made to adopt this principle of their Constitution that the executive power attributed to the Federal members, made up of Senators and Representatives added together for each State, is to go through the formality of the election of a President upon that principle and upon that calculation, and then find that the executive power that they supposed was involved in that primary choice and expression of the public will is to be administered and controlled by a body made up of the equality of States. I would like to know on what plan our politics are to be carried on; how can you make the combinations, how the forces, how the interests, how the efforts that are to throw themselves into a popular election to raise a presidential control of executive power, and then find that that executive power is all administered on the principle of equality of States. I would like to know how it is that New York and Pennsylvania, and Ohio and Indiana, and Illinois and Missouri, and the great and growing States, are to carry the force of popular will into the executive chair upon the federal numbers of the electoral

colleges, and then find that Rhode Island and Delaware, and the distant States unpeopled, are to control the whole possession and administration of executive power. I would like to know how long we are to keep up the form of electing a President with the will of the people behind him, and then find him stripped of the power thus committed to him in the partition between the States, without regard to numbers or to popular opinion. There is the grave dislocation of the balances of the Constitution; there is the absolute destruction of the power of the people over the presidential authority, keeping up the form of an election, but depriving it of all its results. And I would like to know, if by law or by will this body thus assumes to itself this derangement of the balances of the Constitution as between the States and popular numbers, how long New England can maintain in its share of executive power, as administered here, as large a proportion as belongs to New York, to Pennsylvania, to Ohio, to Indiana, to Illinois, and to Missouri together.

I must think, Mr. Chief Justice and Senators, that there has not been sufficiently considered how far these principles thus debated reach, and how the framers of the Constitution, when they came to debate in the year 1789 in Congress what was or should be the actual and practical allocation of this authority, understood the question perfectly in its bearing and in its future necessities.

True, indeed, Mr. Sherman was always a stern and persistent advocate for the strength of the Senate as against the power of the Executive. It was there, on that point, that the Senate represented the equality of States; and he and Mr. Ellsworth, holding their places in the convention as the representatives of Connecticut, a State then a small State, between the powerful State of Massachusetts on the one side and New York on the other; and Judge Paterson, of New Jersey, the representative of that State, a small State, between the great State of New York on the one side

and the great State of Pennsylvania on the other, were the advocates, undoubtedly, of this distribution of power to the Senate; and, as is well known in the history of the times, a correspondence of some importance took place between the elder Mr. Adams and Mr. Sherman, in the early days of the working of the Government, as to whether the fears of Mr. Adams that the Executive would prove too weak, or the purposes of Mr. Sherman that the Senate should be strong enough, were or were not most in accord with the principles of the Government. But all that was based upon the idea that the concurrence of the Senate, under the terms of the Constitution, in appointment was the only detraction from the supremacy and independence of executive authority.

Now, this question comes up in this form: the power of removal is, and always has been, claimed and exercised by the Executive in this Government, separately and independently of the Senate. Until the act of March 2, 1867, the actual power of removal by the Senate never has been claimed. Some constructions upon the affirmative exercise of the power of appointment by the Executive have at different times been suggested, and received more or less support, tending to the conclusion that thus the Senate might have some hold of the question of removals; and now this act, which we are to consider more definitely hereafter, does not assume in terms to give the Senate a participation in the distinct and separate act of an executive nature, the removal from office. Indeed, the manner in which the Congress has dealt with the subject is quite peculiar. Unable, apparently, to find adequate support for the pretention that the Senate could claim a share in the distinct act of removal or vacating of office, the scheme of the law is to change the tenure of office, so that removability as a separate and independent governmental act, by whomever to be exerted, is obliterated from the powers of this government. Look at that, now, that you do absolutely strike out of the capacity

and resources of this government the power of removing an officer as a separate executive act; I mean an executive act in which you participate. You have determined by law that there shall be no vacation of an office possible, except when and as and by the operation of completely filling it. And so far have you carried that principle that you do not even make it possible to vacate it by the concurrence of the Senate and the President; but you have deliberately and firmly determined that the office shall remain full as an estate and possession of the incumbent, from which he can be removed under no stress of the public necessity except by the fact occurring of a complete appointment for permanent tenure of a successor concurred in by the Senate and made operative by the new appointee going into and qualifying himself in the office.

This seems at the first sight a very extraordinary provision for all the exigencies of a Government like ours, with its forty thousand officers, whose list is paraded here before you, with their twenty-one millions of emoluments, to show the magnitude of the great prize contended for between the Presidency and the Senate. It is a very singular provision, doubtless, that in a Government which includes under it forty thousand officers there should be no governmental possibility of stopping a man in or removing him from an office except by the deliberate succession of a permanent successor approved by the Senate and concurred in by the appointee himself going to the place and qualifying and assuming its duties.

I speak the language of the act, and while the Senate is in session there is not any power of temporary suspension or arrest of fraud or violence, of danger or menace, in the conduct of the subsisting officer. When you are in recess there is a power of suspension given to the Executive, and we are better off in that respect when you are in recess than when you are in session, for we can, by a peremptory and definite

and appropriate action, arrest misconduct by suspension. But as I said before, I repeat, under this act the incumbents of all these offices have a permanent estate until a successor, with your consent and his own, is inducted into the office.

I do not propose to discuss (as quite unnecessary to any decision of any matter to be passed on in your judgment) at any very great length the question of the constitutionality of this law. A very deliberate expression of opinion, after a very valuable and thorough debate, conducted in this body, in which the reasons on each side were ably maintained by your most distinguished members, and a very thorough consideration in the House of Representatives, where able and eminent lawyers, some of whom appear among the managers to-day, gave the country the benefit of their knowledge and their acuteness, have placed this matter upon a legislative judgment of constitutionality. But I think all will agree that a legislative judgment of constitutionality does not conclude a court, and that when legislative judgments have differed, and when the practice of the government for eighty years has been on one side and the new ideas introduced are confessedly of reversal and revolution in those ideas, it is not saying too much to say that after the expression of the legislative will, and after the expression of the opinion of the legislature implied in their action, there yet would remain for debate among jurists and lawyers, among statesmen, among thoughtful citizens, and certainly properly within the province of the Supreme Court of the United States, the question whether the one or the other construction of the Constitution, so vital in its influence upon the government, was the correct and the safe course for the conduct of the government.

Let me ask your attention for a moment upon two points, to the question as presenting itself to the minds of the Senators, as to whether this was or was not a reversal and revolution in the practice and theories of the government, and also

as to the weight of a legislative opinion. In the Senate, the Senator from Oregon [Mr. Williams] said:

This bill undertakes to reverse what has heretofore been the admitted practice of the government; and it seemed to me that it was due to the exalted office of the President of the United States, the Chief Magistrate of the nation, that he should exercise this power; that he should be left to choose his own cabinet, and that he should be held responsible, as he will be, to the country for whatever acts that cabinet may perform. (Congressional Globe, thirty-ninth Congress, second session, p. 384.)

This Senator touches the very marrow of the matter, that when you are passing this bill, which in the whole official service of this country reverses the practice, you should at least leave the exception of the cabinet officers in. That was the point; leaving them entirely in, and that, with that exception in, it was a reversal of the practice of the Government to all the rest, and the cabinet should be left as they were, because, as he said wisely, the country will hold the Executive responsible for what his cabinet does; and they will so hold him until they find out that you have robbed the Executive of all responsibility by robbing it of what is the pith of responsibility, discretion.

The same honorable senator proceeds, in another point of the debate:

I know there is room for disagreement of opinion; but it seemed to me that if we revolutionize the practice of the government in all other respects, we might let this power remain in the hands of the President of the United States—

That is, the cabinet officers' appointment—

that we ought not to strip him of this power, which is one that it seems to me it is necessary and reasonable that he should exercise. (*Ibid.*, p. 384.)

The honorable senator from Michigan [Mr. Howard] says:

I agree with him—



Referring to the senator from Indiana [Mr. Hendricks:]

that the practical precedents of the government thus far lead to this interpretation of the Constitution, that it is competent for the President during the recess of the Senate to turn out of office a present incumbent, and to fill his place by commissioning another. This has been, I admit, the practice for long years and many generations; but it is to be observed, at the same time, that this claim of power on the part of the Executive has been uniformly contested by some of the best minds of the country. (*Ibid.*, p. 407.)

And now, as to the weight of mere legislative construction, even in the mind of a legislator himself, as compared with other sources of authoritative determination, let me ask your attention to some other very pertinent observations of the honorable senator from Oregon [Mr. Williams]:

Those who advocate the executive power of removal rely altogether upon the legislative construction of the Constitution, sustained by the practice and opinions of individual men. I need not argue that the legislative construction of the Constitution has no binding force. It is to be treated with proper respect; but few constructions have been put upon the Constitution by Congress at one time that have not been modified or overruled at other or subsequent times, so that, so far as the legislative construction of the Constitution upon this question is concerned, it is entitled to very little consideration. (*Ibid.*, p. 439.)

The point in the debate was that the legislative construction of 1789, as worked into the bones of the Government by the indurating process of practice and exercise, was a construction of powerful influence on the matter; and yet the honorable Senator from Oregon justly pushes the proposition that legislative construction *per se*—that I may not speak disrespectfully, I speak his words—“that legislative construction is entitled to very little consideration”; that it has “no binding force.” Shall we be told that a legislative construction of March 2, 1867, and a practice under

it for one year that has brought the Congress face to face with the Executive and introduced the sword of impeachment between the two branches upon a removal from office, raising the precise question that an attempt by the President to remove a Secretary and appoint an *ad interim* discharge of its duties is to result in a removal by the Senate of the Executive itself and the appointment of one of its own members to the *ad interim* discharge of the duties of the Presidency? That is the issue made by a recent legislative construction.

But the honorable Senator from Oregon, with great force and wisdom, as it seems to me, proceeded in the debate to say that the courts of law, and, above all, the Supreme Court of the United States, were the places to look for authoritative, for permanent determinations of these constitutional questions; and it will be found that in this he but followed the wisdom shown in the debate in 1789 and in the final result of it, in which Mr. Sherman concurred as much as any member of that Congress, that it was not for Congress to name or assign the limits upon executive power by enactment nor to appropriate and confer executive power by endowment through an act of Congress, but to leave it, as Mr. White, of North Carolina, said, and as Mr. Gerry, of Massachusetts, said, and as Mr. Sherman, of Connecticut, said, for the Constitution itself to operate upon the foreign secretary act, and let the action be made under it by virtue of a claim of right under the Constitution, and whoever was aggrieved let him raise his question in the courts of law. And upon that resolution and upon that situation of the thing the final vote was taken, and the matter was disposed of in that Congress; but it was then and ever since has been regarded as an authentic and authoritative determination of that Congress that the power was in the President, and it has been so insisted upon, so acted upon ever since, and nobody has been aggrieved, and nobody has raised

the question in the courts of law. That is the force and the weight of the resolution of that first Congress and of the practice of the Government under it.

In the House of Representatives, also, it was a conceded point in the debate upon this bill, when one of the ablest lawyers in that body, as I understand by repute, Mr. Williams, one of the honorable managers, in his argument for the bill, said:

It aims at the reformation of a giant vice in the administration of this Government by bringing its practice back from a rule of its infancy and inexperience. (*Ibid.*, p. 18.)

He thought it was a faulty practice; but that it was a practice, and that from its infancy to the day of the passage of the bill it was a vice inherent in the system and exercising its power over its action, he did not doubt. He admits, subsequently, in the same debate that the Congress of 1789 decided, and their successors for three-quarters of a century acquiesced in this doctrine.

I will not weary the Senate with a thorough analysis of the debate of 1789. It is, I believe, decidedly the most important debate in the history of Congress. It is, I think, the best considered debate in the history of the Government. I think it included among its debaters as many of the able men and of the wise men; the benefit of whose public service this nation has ever enjoyed, as any debate or measure that this Government has ever entertained or canvassed. And it was a debate in which the civil prudence and forecast of the debaters manifested itself, whichever side they took of the question, in wonderful wisdom, for the premises of the Constitution were very narrow. Most probably the question of removal from office as a distinct subject had never occurred to the minds of men in the convention. The tenure of office was not to be made permanent, except in the case of the justices of the Supreme Court, and the perio-

dicity of the House of Representatives, of the Senate, and of the Executive were fixed. Then there was an attribution of the whole inferior administrative official power of the Government to the Executive as being an executive act, with the single qualification, exceptional in itself, that the advice and consent of the Senate should be interposed as a negative upon presidential nomination, carrying him back to a substitute if they should not agree on the first nominee.

The point raised was exactly this, and may be very briefly stated: those who, with Mr. Sherman, maintained that the concurrence in removals was as necessary as the concurrence in appointments, put themselves on a proposition that the same power that appointed should have the removal. That was a little begging of the question—speaking it with all respect—as to who the appointing power was really, under the terms and in the intent of the Constitution. But, conceding that the connection of the Senate with the matter really made them a part of the appointing power, the answer to the argument, triumphant as it seems to me, as it came from the distinguished speakers, Mr. Madison, Mr. Boudinot, Fisher Ames, and other supporters of the doctrine that finally triumphed, was this: primarily the whole business of official subordinate executive action is a part of the executive function; that being attributed *in solido* to the President, we look to exceptions to serve the turn and precise measure of their own definition, and discard that falsest principle of reasoning in regard to laws or in regard to conduct, that exception is to breed exception or amplification of exception. The general mass is to lose what is subtracted from it by exception, and the general mass is to remain with its whole weight not thus separately and definitely reduced. When, therefore, these statesmen said you find the freedom of executive action and its solid authority reduced by an exception of advice and consent in appointment, you must understand that that is the limit of the exception,

and the executive power in all other respects stands unimpaired.

What, then, is the test of the consideration? Whether removal from office belongs to the executive power, if the Constitution has not attributed it elsewhere; and then the question was of statesmanship, whether this debate was important, whether it was vital, whether its determination one way or the other did affect seriously the character of the government and its working; and I think all agreed that it did; and all so agreeing, and all coming to the resolution that I have stated, what weight, what significance is there in the fact that the party that was defeated in the argument submitted to the conclusion and to the practice of the Government under it, and did not raise a voice or take a vote in derogation of it during the whole course of the Government?

But it does not stand upon this. After forty-five years' working of this system, between the years 1830 and 1835, the great party exacerbations between the democracy, under the lead of General Jackson, and the whigs, under the mastery of the eminent men that then filled these halls, the only survivor of whom, eminent then himself and eminent ever since, now does me the honor to listen to my remarks [referring to Hon. Thomas Ewing, of Ohio], then under that antagonism there was renewed the great debate; and what was the measure to which the contesting party, under the influence of party spirit, brought the matter? Mr. Webster said while he led the forces in a great array, which, perhaps, for the single instance combined the triumvirate of himself, Mr. Calhoun, and Mr. Clay, that the contrary opinion and the contrary practice was settled. He said: "I regard it as a settled point; settled by construction, settled by precedent, settled by the practice of the Government, settled by legislation;" and he did not seek to disturb it. He knew the force of those forty-five years, the whole exist-

ence of the nation under its Constitution upon a question of that kind; and he sought only to interpose a moral restraint upon the President in requiring him, when he removed from office, to assign the reasons of the removal.

General Jackson and the democratic party met the point promptly with firmness and with thoroughness, and in his protest against a resolution which the Senate had adopted in 1834, I think, that his action in the removal of Mr. Duane (though they brought it down finally, I believe, to the point of the removal of the deposits) had been in derogation of the Constitution and the laws, he met it with a defiance in his protest which brought up two great topics of debate; one the independence of the Executive in its right to judge of constitutional questions, and the other the great point that the conferring by choice of the people upon the President of their representation through federal numbers was an important part of the Constitution, and that he was not a man of his own will, but endued and re-enforced by the will of the people. That debate was carried on and that debate was determined by the Senate passing a vote which enacted its opinion that his conduct had been in derogation of the Constitution and the law; and on this very point a reference was made to the common master of them all, the people of the United States; and upon a re-election of General Jackson and upon a confirmation of opinion from the people themselves, they in their primary capacity acting through the authentic changes of their Government, by election, brought into the Senate, upon this challenge, a majority that expunged the resolution censuring the action of the Executive. You talk about power to decide constitutional questions by Congress, power to decide them by the Supreme Court, power to decide them by the Executive. I show you the superior power of all that has been drawn into the great debate, of public opinion and the determination of the suffrage, and I say that the history of free coun-

tries, the history of popular liberty, the history of the power of the people, not by passion or by violence, but by reason, by discretion and peaceful, silent, patient exercise of their power, was never shown more distinctly and more definitely than on this very matter, whether it is a part of the executive power of this country or of the legislative or senatorial power, that removal from office should remain in the Executive or be distributed among the Senators. It was not my party that was pleased or that was triumphant, but of the fact of what the people thought there was not any doubt, and there never has been since until the new situation has produced new interests and resulted in new conclusions.

Honorable Senators and Representatives will remember how in the debate which led to the passage of the civil tenure act it was represented that the authority of the first Congress of 1789 ought to be somewhat scrutinized because of the influence upon their debates and conclusions that the great character of the Chief Magistrate, President Washington, might have produced upon their minds. Senators, why can we not look at the present as we look at the past? Why can we not see in ourselves what we so easily discern as possible with others? Why can we not appreciate it that perhaps the judgment of Senators and of Representatives now may have been warped or misled somewhat by their opinions and feelings toward the Executive as it is now filled? I apprehend, therefore, that this matter of party influence is one that is quite as wise to consider, and this matter of personal power in authority of character and conduct is quite as suitable to be weighed when we are acting as when we are criticising the action of others.

Two passages I may be permitted to quote from this great debate as carried on in the Congress of 1789. One is from Mr. Madison, at page 480 of the first volume of the Annals of Congress:

It is evidently the intention of the Constitution that the first

magistrate should be responsible for the executive department. So far, therefore, as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country. Again, is there no danger that an officer, when he is appointed by the concurrence of the Senate, and has friends in that body, may choose rather to risk his establishment on the favor of that branch than rest it upon the discharge of his duties to the satisfaction of the executive branch, which is constitutionally authorized to inspect and control his conduct? And if it should happen that the officers connect themselves with the Senate, they may mutually support each other, and for want of efficacy reduce the power of the President to a mere vapor; in which case his responsibility would be annihilated, and the expectation of it unjust. The high executive officers, joined in cabal with the Senate, would lay the foundation of discord, and end in an assumption of the executive power, only to be removed by a revolution in the Government. I believe no principle is more clearly laid down in the Constitution than that of responsibility.

Mr. Boudinot (page 487) says:

Neither this clause [of impeachment] nor any other goes so far as to say it shall be the only mode of removal: therefore, we may proceed to inquire what the other is. Let us examine whether it belongs to the Senate and President. Certainly, sir, there is nothing that gives the Senate this right in express terms; but they are authorized, in express words, to be concerned in the appointment. And does this necessarily include the power of removal? If the President complains to the Senate of the misconduct of an officer, and desires their advice and consent to the removal, what are the Senate to do? Most certainly they will inquire if the complaint is well founded. To do this they must call the officer before them to answer. Who, then, are the parties? The supreme executive officer against his assistant; and the Senate are to sit as judges to determine whether sufficient cause of removal exists. Does not this set the Senate over the head of the President? But suppose they shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no



confidence, reversing the privilege given him by the Constitution, to prevent his having officers imposed upon him who do not meet his approbation?

In these weighty words of Mr. Boudinot and Mr. Madison is found the marrow of the whole controversy. There is no escaping from it. If this body pursue the method now adopted, they must be responsible to the country for the action of the executive department; and if officers are to be maintained, as these wise statesmen say, over the head of the President, then that power of the Constitution which allowed him to have a voice in their selection is entirely gone; for I need not say that if it is to be dependent upon an instantaneous selection, and thereafter there is to be no space of repentance or no change of purpose on the part of the Executive as new acts shall develop themselves and new traits of character shall show themselves in the incumbent, it is idle to say that he has the power of appointment. It must be the power of appointment from day to day; that is the power of appointment for which he should be held responsible, if he is to be responsible at all. I wish to ask your attention to the opinions expressed by some of the statesmen who took part in this determination of what the effect, and the important effect, of this conclusion of the Congress of 1789 was. None of them overlooked its importance on one side or the other; and I beg leave to read from the life and works of the elder Adams, at page 448 of the first volume, the interesting comments of one, himself a distinguished statesman, in whom we all have confidence, Mr. Charles Francis Adams:

The question most earnestly disputed turned upon the power vested by the Constitution in the President to remove the person at the head of that bureau at his pleasure. One party maintained it was an absolute right. The other insisted that it was subject to the same restriction of a ratification by the Senate which is required when the officer is appointed. After a long contest in

the House of Representatives, terminating in favor of the unrestricted construction, the bill came up to the Senate for its approbation.

This case was peculiar and highly important. By an anomaly in the Constitution, which, upon any recognized theory, it is difficult to defend, the Senate, which, in the last resort, is made the judicial tribunal to try the President for malversation in office, is likewise clothed with the power of denying him the agents in whom he may choose most to confide for the faithful execution of the duties of his station, and forcing him to select such as they may prefer. If, in addition to this, the power of displacing such as he found unworthy of trust had been subjected to the same control, it cannot admit of a doubt that the Government must, in course of time, have become an oligarchy, in which the President would sink into a mere instrument of any faction that might happen to be in the ascendant in the Senate; this, too, at the same time that he would be subject to be tried by them for offences in his department, over which he could exercise no effective restraint whatever. In such case the alternative is inevitable, either that he would have become a confederate with that faction, and therefore utterly beyond the reach of punishment by impeachment at their hands for offences committed with their privity, if not at their dictation, or else, in case of his refusal, that he would have been powerless to defend himself against the paralyzing operation of their ill-will. Such a state of subjection in the executive head to the legislature is subversive of all ideas of a balance of powers drawn from the theory of the British constitution, and renders probable at any moment a collision, in which one side or the other, and it is most likely to be the legislature, must be ultimately annihilated.

Yet, however true these views may be in the abstract, it would scarcely have caused surprise if their soundness had not been appreciated in the Senate. The temptation to magnify their authority is commonly all-powerful with public bodies of every kind. In any other stage of the present Government than the first it would have proved quite irresistible. But throughout the administration of General Washington there is visible among public men a degree of indifference to power and place which forms one of the most marked features of that time. More than once the

highest cabinet and foreign appointments went begging to suitable candidates, and begged in vain. To this fact it is owing that public questions of such moment were then discussed with as much of personal disinterestedness as can probably ever be expected to enter into them anywhere. Yet even with all these favoring circumstances it soon became clear that the republican jealousy of a centralization of power in the President would combine with the *esprit du corps* to rally at least half the Senate in favor of subjecting removals to their control. In such a case the responsibility of deciding the point devolved, by the terms of the Constitution, upon Mr. Adams, as Vice-President. The debate was continued from the 15th to the 18th of July, a very long time for that day in an assembly comprising only twenty-two members when full, but seldom more than twenty in attendance. A very brief abstract, the only one that has yet seen the light, is furnished in the third volume of the present work. Mr. Adams appears to have made it for the purpose of framing his own judgment in the contingency which he must have foreseen as likely to occur. The final vote was taken on the 18th. Nine Senators voted to subject the President's power of removal to the will of the Senate: Messrs. Few, Grayson, Gunn, Johnson, Izard, Langdon, Lee, Maclay, and Wingate. On the other hand, nine Senators voted against claiming the restriction: Messrs. Bassett, Carroll, Dalton, Elmer, Henry, Morris, Paterson, Read, and Strong. The result depended upon the voice of the Vice-President. It was the first time that he had been summoned to such a duty. It was the only time during his eight years of service in that place that he felt the case to be of such importance as to justify his assigning reasons for his vote. These reasons were not committed to paper, however, and can, therefore, never be known. But in their soundness it is certain that he never had the shadow of a doubt. His decision settled the question of constitutional power in favor of the President, and, consequently, established the practice under the Government, which has continued down to this day. Although there have been occasional exceptions taken to it in argument, especially at moments when the executive power, wielded by a strong hand, seemed to encroach upon the limits of the co-ordinate departments, its substantial correctness has been, on the whole,

quite generally acquiesced in. And all have agreed that no single act of the first Congress has been attended with more important effects upon the working of every part of the Government.

It is thus that this was regarded at the time that the transaction took place. I beg now to call the attention of the Senate to the opinions of Fisher Ames, as expressed in letters written by him concurrently with the action of the Congress to his correspondent, an intelligent lawyer of Boston, Mr. George Richards Minot. In a letter to Mr. Minot, dated the 31st of May, 1789, to be found in the first volume of the life of Mr. Ames, page 51, he writes:

You dislike the responsibility of the President in the case of the minister of foreign affairs. I would have the President responsible for his appointments; and if those whom he puts in are unfit they may be impeached on misconduct, or he may remove them when he finds them obnoxious. It would be easier for a minister to secure a faction in the Senate or get the protection of the Senators of his own State than to secure the protection of the President, whose character would suffer by it. The number of the Senators, the secrecy of their doings, would shelter *them*, and a corrupt connection between those who appoint *to* office and who also maintain *in* office and the officers themselves would be created. The meddling of the Senate in appointments is one of the least defensible parts of the Constitution. I would not extend their power any further.

And again, under date of June 23, 1789, page 55 of the same volume:

The debate in relation to the President's power of removal from office is an instance. Four days' unceasing speechifying has furnished you with the merits of the question. The transaction of yesterday may need some elucidation. In the Committee of the Whole it was moved to strike out the words, "to be removable by the President," &c. This did not pass, and the words were retained. The bill was reported to the House, and a motion made to insert in the second clause, "whenever an officer shall be removed

by the President, or a vacancy shall happen in any other way," to the intent to strike out the first words. The first words, "to be removable," &c, were supposed to amount to a legislative disposal of the power of removal. If the Constitution had vested it in the President, it was improper to use such words as would imply that the power was to be exercised by him in virtue of this act. The mover and supporters of the amendment supposed that a grant by the legislature might be resumed, and that as the Constitution had already given it to the President it was putting it on better ground; and, if once gained by the declaration of both houses, would be a construction of the Constitution, and not liable to future encroachments. Others, who contended against the advisory part of the Senate in removals, supposed the first ground the most tenable, that it would include the latter, and operate as a declaration of the Constitution, and at the same time expressly dispose of the power. They further apprehended that any change of position would divide the victors and endanger the final decision in both houses. There was certainly weight in this last opinion. Yet, the amendment being actually proposed, it remained only to choose between the two clauses. I think the latter, which passed, and which seems to imply the legal (rather constitutional) power of the President, is the safest doctrine. This prevailed, and the first words were expunged. This has produced discontent, and possibly in the event it will be found disagreement, among those who voted with the majority.

This is, in fact, a great question, and I feel perfectly satisfied with the President's right to exercise the power, either by the Constitution or the authority of an act. The arguments in favor of the former fall short of full proof, but in my mind they greatly preponderate.

You will say that I have expressed my sentiments with some moderation. You will be deceived, for my whole heart has been engaged in this debate. Indeed, it has ached. It has kept me agitated, and in no small degree unhappy. I am commonly opposed to those who modestly assume the rank of champions of liberty and make a very patriotic noise about the people. It is the stale artifice which has duped the world a thousand times, and yet, though detected, it is still successful. I love liberty as well as

anybody. I am proud of it, as the true title of our people to distinction above others; but so are others, for they have an interest and a pride in the same thing. But I would guard it by making the laws strong enough to protect it. In this debate a stroke was aimed at the vitals of the government, perhaps with the best intentions, but I have no doubt of the tendency to a true aristocracy.

It will thus be seen, Senators, that the statesmen whom we most revere regarded this as, so to speak, a construction of the Constitution as important as the framing of itself had been. And now, a law of Congress having introduced a revolution in the doctrine and in the practice of the Government, a legislative construction binding no one and being entitled to little respect from the changeableness of legislative constructions, in the language of the honorable Senator from Oregon, the question arises whether a doubt, whether an act in reference to the unconstitutionality of this law on the part of the executive department is a ground of impeachment. The doctrine of unconstitutional law seems to me—and I speak with great respect—to be wholly misunderstood by the honorable managers in the propositions which they present. Nobody can ever violate an unconstitutional law, for it is not a rule binding upon him or anybody else. His conduct in violating it or in contravening it may be at variance with other ethical and civil conditions of duty: and for the violation of those ethical and civil conditions he may be responsible. If a marshal of the United States, executing an unconstitutional fugitive slave bill, enters with the process of the authority of law, it does not follow that resistance may be carried to the extent of shooting the marshal; but it is not because it is a violation of that law; for if it is unconstitutional there can be no violation of it. It is because civil duty does not permit civil contests to be raised by force and violence. So, too, if a subordinate executive officer, who has nothing but

ministerial duty to perform, as a United States marshal in the service of process under an unconstitutional law, undertakes to deal with the question of its unconstitutionality, the ethical and civil duty on his part is, as it is merely ministerial on his part, to have his conscience determine whether he will execute it in this ministerial capacity, or whether he will resign his office. He cannot, under proper ethical rules, determine whether the execution of the law shall be defeated by the resistance of the apparatus provided for its execution; but if the law bears upon his personal rights or official emoluments, then, without a violation of the peace, he may raise the question of the law and resist it consistently with all civil and ethical duties.

Thus we see at once that we are brought face to face with the fundamental propositions, and I ask attention to a passage from the *Federalist*, at page 549, where there is a very vigorous discussion by Mr. Hamilton of the question of unconstitutional laws; and to the case of *Marbury vs. Madison* in 1 Cranch. The subject is old, but it is there discussed with a luminous wisdom, both in advance of the adoption of the Constitution and of its construction by the Supreme Court of the United States, that may well displace the more inconsiderate and loose views that have been presented in debate here. In the *Federalist*, No. 78, page 541, Mr. Hamilton says:

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles than

that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion, by any means, suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.



Again:

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty. (*Ibid.*, 544.)

In the case of *Marbury vs. Madison* (1 Cranch, pp. 175, 178), the Supreme Court of the United States, speaking through the great Chief Justice Marshall, said:

The question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States; but happily not of an intricacy proportioned to its interests. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established are deemed fundamental, and as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent.

This original and supreme will organizes the Government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.

The Government of the United States is of the latter description. The powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited

powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered by the Court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not law does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court

must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the Courts are to regard the Constitution—and the Constitution is superior to any ordinary act of the legislature—the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered in Court as a paramount law, are reduced to the necessity of maintaining that Courts must close their eyes on the Constitution and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our Government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient in America, where written constitutions have been viewed with so much reverence for rejecting the construction.

Undoubtedly it is a question of very grave consideration how far the different departments of the Government, legislative, judicial, and executive, are at liberty to act in reference to unconstitutional laws. The judicial duty, perhaps, may be plain. They wait for a case; they volunteer no advice; they exercise no supervision. But as between the legislature and the Executive, even when the Supreme Court has passed upon the question, it is one of the gravest constitutional points for public men to determine when and how the legislature may raise the question again by passing

a law against the decision of the Supreme Court, and the Executive may raise the question again by undertaking an executive duty under the Constitution against the decision of the Supreme Court and against the determination of Congress. We in this case have been accused of insisting upon extravagant pretensions. We have never suggested anything further than this, for the case only requires it, that whatever may be the doubtful or debatable region of the co-ordinate authority of the different departments of Government to judge for themselves of the constitutionality or unconstitutionality of laws, to raise the question anew in their authentic and responsible public action, when the President of the United States, in common with the humblest citizen, finds a law passed over his right, and binding upon his action in the matter of his right, then all reasons of duty to self, to the public, to the Constitution, to the laws, require that the matter should be put in the train of judicial decision, in order that the light of the serene reason of the Supreme Court may be shed upon it, to the end that Congress even may reconsider its action and retract its encroachment upon the Constitution.

But Senators will not have forgotten that General Jackson, in his celebrated controversy with the whig party, claimed that no department of the Government should receive its final and necessary and perpetual exclusion and conclusion on a constitutional question from the judgment even of the Supreme Court, and that under the obligations of each one's oath, yours as Senators, yours as Representatives, and the President's as Chief Executive, each must act in a new juncture and in reference to a new matter arising to raise again the question of constitutional authority. Now, let me read in a form which I have ready for quotation a short passage on which General Jackson in his protest sets this forth. I read from a debate on the fugitive slave law as conducted in this body in the year 1852, when the honorable

Senator from Massachusetts [Mr. Sumner] was the spokesman and champion of the right for every department of the Government to judge the constitutionality of law and of duty:

But whatever may be the influence of this judgment—

That is, the judgment of the Supreme Court of the United States in the case of *Prigg vs. Pennsylvania*—

But whatever may be the influence of this judgment as a rule to the judiciary, it cannot arrest our duty as legislators. And here I adopt, with entire assent, the language of President Jackson, in his memorable veto, in 1832, of the Bank of the United States. To his course was opposed the authority of the Supreme Court, and this is his reply:

"If the opinion of the Supreme Court covers the whole ground of this act it ought not to control the co-ordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. *Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.* It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

With these authoritative words of Andrew Jackson I dismiss this topic. (Appendix to Congressional Globe, Thirty-second Congress, first session, p. 1108.)

"Times change and we change with them." Nevertheless, principles remain, duties remain, the powers of Government remain, their co-ordination remains, the conscience of men remains, and everybody that has taken an oath, and every-

body that is subject to the Constitution without taking an oath, by peaceful means has a right to revere the Constitution in derogation of unconstitutional laws; and any legislative will or any judicial authority that shall deny the supremacy of the Constitution in its power to protect men who thus conscientiously, thus peacefully raise questions for determination in a conflict between the Constitution and the law, will not be consistent with written constitutions or with the maintenance of the liberties of this people as established by and dependent upon the preservation of written constitutions.

Now let us see whether upon every ethical, constitutional, and legal rule the President of the United States was not the person upon whom this civil-tenure act operated, not as an executive officer to carry out the law, but as one of the co-ordinate departments of the government over whom in that official relation the authority of the act was sought to be asserted. The language is general: "Every removal from office contrary to the provisions of this act shall be a high misdemeanor." Who could remove from office but the President of the United States? Who had the authority? Who could be governed by the law but he? And it was in an official constitutional duty, not a personal right, not a matter of personal value or choice or interest with him.

When, therefore, it is said and claimed that by force of a legislative enactment the President of the United States should not remove from office, whether the act of Congress was constitutional or not, that he was absolutely prohibited from removing from office, and if he did remove from office, although the Constitution allowed him to remove, yet the Constitution could not protect him for removing, but that the act of Congress, seizing upon him, could draw him in here by impeachment and subject him to judgment for violating the law, though maintaining the Constitution, and that the Constitution pronounced sentence of condemnation

and infamy upon him for having worshiped its authority and sought to maintain it, and that the authority of Congress has that power and extent practically, you tear asunder your Constitution, and (if on these grounds you dismiss this President from this Court convicted and deposed) you dismiss him the victim of the Congress and the martyr of the Constitution by the very terms of your judgment, and you throw open for the masters of us all in the great debates of an intelligent, instructed, populous, patriotic nation of freemen the division of sentiment to shake this country to its centre, "the omnipotence of Congress" as the rallying cry on one side, and "the supremacy of the Constitution" on the other.

There is but one other topic that I need to insist upon here as bearing upon that part of my argument which is intended to exhibit to the clear apprehension, and I hope adoption, of this court, the view that all here that possesses weight and dignity, that really presents the agitating contest which has been proceeding between the departments of our Government, is political and not criminal, or suitable for judicial cognizance; and that is what seems to me the decisive test in your judgments and in your consciences; and that is the attitude that every one of you already in your public action occupies toward this subject.

The Constitution of the United States never intended so to coerce and constrain the consciences and the duties of men as to bring them into the position of judges between themselves and another branch of government in regard to matters of difference between themselves and that other branch of Government in matters which concerned wholly the partition of authority under the Constitution between themselves and that other department of the Government. The eternal principles of justice are implied in the constitution of every court, and there are no more immutable, no more inevitable principles than these, that no man shall be a

judge in his own cause, and that no man shall be a judge in a matter in which he has already given judgment. It is abhorrent to the natural sense of justice that men should judge in their own cause. It is inconsistent with nature itself that man should assume an oath and hope to perform it by being impartial in his judgment when he has already formed it. The crimes that a President may have imputed to him that may bring him into judgment of the Senate are crimes against the Constitution or the laws involving turpitude or personal delinquency.

They are crimes in which it is inadmissible to imagine that the Senate should be committed as parties at all. They are crimes which, however much the necessary reflection of political opinions may bias the personal judgment of this or that member, or all the members of the body—an infirmity in the Court which cannot be avoided—yet it must be possible only that they should give a color or a turn and not be themselves the very basis and substance of the judgment to be rendered. When, therefore, I show you as from the records of the Senate that you yourselves have voted upon this law whose constitutionality is to be determined, and that the question of guilt or innocence arises upon constitutionality or judgment of constitutionality, when you have in your capacity of a Senate undertaken after the alleged crime committed, as an act suitable in your judgment to be performed by you in your relation to the executive authority and your duty under this Government to pronounce, as you did by resolution, that the removal of Mr. Stanton and the appointment of General Thomas were not authorized by the Constitution and the laws, you either did or did not regard that as a matter of political action; and if you regarded it as a matter of political action, then you regarded it as a matter that could not possibly be brought before you in your judicial capacity for you to determine upon any personal consequences to the Executive.



How was it a matter for political action unless it was a matter of his political action and the controversy was wholly of a political nature? If you, on the other hand, had in your minds the possibility of this extraordinary jurisdiction being brought into play by a complaint to be moved by the House of Representatives before you, what an extraordinary spectacle do you present to yourselves and to the country! No; the controlling, the necessary feeling upon which you acted must have been that "it is a stage and a step in governmental action concerning which we give this admonition and this suggestion and this reproof."

In 1834, when the Senate of the United States was debating the question of the resolution condemnatory of General Jackson's proceedings in reference to the deposits and Mr. Duane, the question was raised, "Can you, will you, should you pronounce opinion upon a matter of this kind when possibly it may be made the occasion, if your views are right, of an impeachment and of a necessary trial?" The answer of the great and trusted statesman of the Whig party of that day was, "If there was in the atmosphere a whisper, if there was in the future a menace, if there was a hope or a fear, accordingly as we may think or feel, that impeachment was to come, debate must be silenced and the resolution suppressed." But they recognized the fact that it was mere political action that was being resorted to, and all that was or was to be possible; but the complexion of the House, and the sentiment of the House, and the attitude of the Senate as claiming it only to be matter of political discussion and determination, absolutely rejected the notion of impeachment, as within the range of discussion and held, therefore, the debate, a mere political debate and the conclusion a political conclusion.

There is but one proposition that consists with the truth of the case and with the situation of you, Senators, here, and that is that you regarded this as political action and polit-

ical decision, not by possibility a matter of judgment on a subject to be introduced for judicial consideration. It is not true that that resolution purports to cover justifiable guilt; it only expresses an opinion that the state of the law and the authority of the Constitution did not justify the action of the President, but it does not impute violence or design or wickedness of purpose, or other than a justifiable difference of opinion to resort to an arbiter between you. But, even in that limited view, I take it no senator can think or feel that, as a preliminary part of the judgment of a court that was to end in acquittal or conviction, this proceeding could be for a moment warranted.

The two gravest articles of impeachment against the weightiest trial ever introduced into this court, those on which as large a vote of condemnation was gained as upon any others, were the two articles against Judge Chase, one of which brought him in question for coming to the trial of Fries, in Pennsylvania, with a formed and pronounced opinion; and another, the third, was for allowing a jurymen to enter the box on the trial of Callender, at Richmond, who stated that he had formed an opinion.

I would like to see a court of impeachment that regards this as great matter that a judge should come to a trial and pronounce a condemnation of the prisoner before the counsel are heard, and should allow a jurymen to enter the box who excused himself from having a free mind on the point discussed as he had formed an opinion, and yet that should tell us that you, having formed and expressed an opinion, are to sit here judges on such a matter as this. What is there but an answer of this kind necessary? The Constitution never brings a Senate into an inculpation and a condemnation of a President upon matters in which and of which the two departments of the government in their political capacities have formed and expressed political opinions. It is of other matter and of other fault, in which there are

no parties and no discriminations of opinion. It is of offence, of crime, in which the common rules held by all of duty, of obligation, of excess, or of sin, are not determinable upon political opinions formed and expressed in debate.

But the other principle is equally contravened, and this aids my argument that it is political and not personal or criminal; it is that you are to pass judgment of and concerning the question of the partition of the offices of this government between the President and yourselves. The very matter of his fault is that he claims them; the very matter of his condemnation is that you have a right to them; and you, aided by the list furnished by the managers, of forty-one thousand in number and \$21,000,000 of annual emolument, are to sit here as judges whether his mistaken claim and his appeal to a common arbiter in a matter of this kind is to be imputed to him as personal guilt and followed by personal punishment.

How would any of us like to be tried before a judge who, if he condemned us, would have our houses, and if he acquitted us we should have his? So sensitive is the natural sense of justice on this point that the whole country was in a blaze by a provision in the fugitive slave law that a commissioner should have but five dollars if he set the slave free, and ten dollars if he remanded him. Have honorable judges of this court forgotten that crisis of the public mind as to allowing a judge to have an interest in the subject of his judgment? Have they forgotten that the honorable senator from Massachusetts in the debate upon this tenure-of-office act thought that political bias might affect a court so that it might give judgment of but nominal punishment for an infraction of the act? And yet you are full of politics. Why? Because the question is political; and the whole point of my reference is as an absolute demonstration that the Constitution of the United States never forces honorable men into a position where they are judges in their own

cause, or where they have in the course of their previous duties expressed a judgment.

I have omitted from this consideration the fact that the great office itself, if by your judgment it shall be taken from the elected head of this republic, is to be put in commission with a member of your own body chosen to-day, and to-morrow, at any time, by yourselves, and that you are taking the crown of the people's magistracy and of the people's glory to decorate the honor of the Senate. An officer who, by virtue of your favor, holds the place of President *pro tempore* of your body adds the Presidency to its duties by the way; and an officer changeable from day to day by you as you choose to have a new President *pro tempore*, who by the same title takes from day to day the discharge of the duties of President of the United States.

When the prize is that, and when the circumstances are as I have stated, Senators must decline a jurisdiction upon this demonstration that human nature and human virtue cannot endure that men should be judges in such a strife. I will agree your duty keeps you here. You have no right to resign or avoid it; but it is a duty consistent with judicial fairness, and only to be assumed as such; and the subject itself, thus illustrated, snatches from you at once, as wholly political, the topics that you have been asked to examine.

It will suit my convenience and sense of the better consideration of the separate articles of impeachment to treat them at first somewhat generally, and then, by such distribution as seems most to bring us finally to what, if it shall not before that time have disappeared, appears to be the gravest matter of consideration.

Let me ask you at the outset to see how little as matter of evidence this case is. Certainly this President of the United States has been placed under as trying and as hot a gaze of political opposition as ever a man was or could be. Certainly for two years there has been no partial construc-

tion of his conduct. Certainly for two years he has been sifted as wheat by one of the most powerful winnowing machines that I have ever heard of—the House of Representatives of the United States of America. Certainly the wealth of the nation, certainly the urgency of party, certainly the zeal of political ambition, have pressed into the service of imputation, of inculcation, and of proof all that this country affords, all that the power “to send for persons and papers” includes.

They have none of the risks that attend ordinary litigants of bringing their witnesses in court to stand the test of open examination and cross-examination; but they can put them under the constriction of an oath and an exploration in advance and see what they can prove, and so determine whom they will bring and whom they will reject. They can take our witness from the stand already under oath, and even of so great and high a character as the Lieutenant General of your armies, and out of court ply him with a new oath and a new examination to see whether he will help or hurt them by being cross-examined in court. Every arm and every heart is at their service, stayed by no sense except of public duty to unnerve their power or control its exercise.

And yet here is the evidence. The people of this country have been made to believe that all sorts of personal vice and wickedness, that all sorts of official misconduct and folly, that all sorts of usurpation and oppression, practiced, meditated, plotted, and executed on the part of this Executive, were to be explored and exposed by the prosecution and certainly set down in the record of this court for the public judgment. Here you have for violence, oppression, and usurpation, a telegram between the President and Governor Parsons, long public, two years ago. You have for his desire to suppress the power of Congress the testimony of Wood, the office-seeker, that when the President said he thought the points were important he said that he thought

they were minor, and that he was willing to take an office from the President and yet uphold Congress; that the President said they were important, and he thought the patronage of the government should be in support of those principles which he maintained, and Wood, the office-seeker, went home and was supposed to have said that the President had used some very violent and offensive words on the subject, and he was brought here to prove them, and he disproved them.

Now, weigh the testimony upon the scale that a nation looks at it, upon the scale that foreign nations look at it, upon the scale that history will apply to it, upon the scale that posterity will in retrospect regard it. It depends a good deal upon how large a selection a few specimens of testimony could offer. If I bring a handful of wheat marked by rust and weevil, and show it to my neighbor, he will say, "Why, what a wretched crop of wheat you have had"; but if I tell him "these few kernels are what I have taken from the bins of my whole harvest," he will answer, "What a splendid crop of wheat you have had." And now answer, answer if there is anything wrong in this. Mr. Manager Wilson, from the Judiciary Committee, that had examined for more than a year this subject, made a report to the House. It is the wisest, the clearest, and also one of the most entertaining views of the whole subject of impeachment in the past and in the present that I have ever seen or can ever expect to see, and what is the result? That it is all political. All these thunder-clouds are political, and it is only this little petty pattering of rain and these infractions of statutes that are personal or criminal. And "the grand inquest of the nation" summoned to the final determination upon the whole array, on the 9th of December, 1867, votes 107 to 57, "no impeachment." If these honorable managers had limited their addresses to this court to matters that in purpose, in character, in intent, and in guilt, occurred after

that bill of impeachment was thrown out by their house, how much you would have been entertained in this cause! I have not heard anything that had not occurred before that. The speeches were made eighteen months before. The telegram occurred a year before. Wood, the office-seeker, came into play long before. What is there, then, not covered by this view?

The honorable managers, too, do not draw together always about these articles. There seems to have been an original production, and then a sort of afterbirth that is added to the compilation, and as I understand the opening manager [Mr. Butler], if there is not anything in the first article you need not trouble yourself to think there is anything in the eleventh; and Mr. Manager Stevens thinks that if there is not anything in the eleventh you had better not bother yourself in looking for anything in the first ten, for he says a county-court lawyer, I think, could get rid of them. Let me give you his exact words:

I wish this to be particularly noticed, for I intend to offer it as an amendment. I wish, gentlemen, to examine and see that this charge is nowhere contained in any of the articles reported, and unless it be inserted there can be no trial upon it; and if there be the shrewd lawyers, as I know there will be, and cavilling judges—

He did not state that he felt sure of that—

and without this article they do not acquit him, they are greener than I was in any case I ever undertook before the court of quarter sessions.

It will not be too vain in us to think that we come up perhaps to this estimate on our side, and at this table, of these quarter-session lawyers that would be adequate to dispose of these articles of impeachment; and they are right about it, quite right about it. If you cannot get in what is political and nothing but political, you cannot get hold of anything that is criminal or personal.

Now, with that general estimate of the limit and feebleness of the proofs and of the charges, I begin with the consideration of an article in regard to which, and the subject-matter of which, I am disposed to concede more than I imagine can be claimed fairly in regard to the other articles, that some proof to the point of demonstration has been presented, and that is the speeches. I think that it has been fairly proved here that the speeches charged upon the President, in substance and in general, were made. My first difficulty about them is that they were made in 1866, and related to a Congress that has passed out of existence, and were a subject in the report of the Judiciary Committee to the House, upon which the House voted that they would not impeach. My next is that they are crimes against rhetoric, against oratory, against taste, and perhaps against logic, but that the Constitution of the United States neither in itself nor by any subsequent amendments has provided for the government of the people of this country in these regards. It is a novelty in this country to try anybody for making a speech.

There are a great many speeches made in this country, and therefore the case undoubtedly would have arisen in the course of eighty years of our Government. Indeed, I believe if there is anything that marks us, and to the approval, at least in ability, of other nations, it is that any man in this country not only has a right to make a speech, but can make a speech and a good one, and that he does some time or other in his life actually accomplish it. Why, the very lowest epithet for speech-making in the American public adopted by the newspapers is "able and eloquent." I have seen applied to the efforts of the honorable managers here the epithet, in advance in the newspapers, of "tremendous" before they have been delivered here, of "tremendous force"; and I saw once an accurate arithmetical statement of the force of one of them in advance that it contained thirty-three thousand words.



We are speech-makers; therefore the case must have arisen for a question of propriety; and now for the first time we begin with the President, and accuse him; we take him before no ordinary court, but organize a court for the purpose, which adjourns the moment it is over with him, furnishes no precedent, and must remove him from office and order a new election. That is a great deal to turn on a speech. Only think of it! To be able to make a speech that should require a new election of a President to be held! Well, if the trial is to take place, let the proclamation issue to this speech-making people, "let him that is without sin among you cast the first stone"; and see how the nation on tiptoe waits; but who will answer that dainty challenge and who assume that fastidious duty? We see in advance the necessary requirements. It must be one who by long discipline has learned always to speak within bounds, one whose lips would stammer at an imputation, whose cheek would blush at a reproach, whose ears would tingle at an invective and whose eyes would close at an indecorum. It must be one who by strict continence of speech and by control over the tongue, that unruly member, has gained with all his countrymen the praise of ruling his own spirit, which is greater than one who taketh a city.

And now the challenge is answered; and it seems that the honorable manager to whom this duty is assigned is one who would be recognized at once in the judgment of all as first in war, first in peace in boldness of words, first in the hearts of all his countrymen that love this wordy intrepidity. Now, the champion being gained, we ask for the rule, and in answer to an interlocutory inquiry which I had the honor to address to him, he said the rule was the opinion of the Court that was to try the case.

Now, let us see whether we can get any guidance as to what your opinions are on this subject of freedom of speech; for we are brought down to that, having no law or precedent

besides. I find that the matter of charge against the President is that he has been "unmindful of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the government." If it prevails from the executive toward the legislative, it should prevail from the legislative toward the executive, upon the same standard, unless I am to be met with what I must regard as a most novel view presented by Mr. Manager Williams in his argument the other day, that as the Constitution of the United States prevents your being drawn in question anywhere for what you say, therefore it is a rule that does not work both ways. Well, that is a remarkable view of personal duty, that if I wore an impenetrable shirt of mail, it is just the thing for me to be drawing daggers against everybody else that is met in the street. "*Noblesse oblige*" seems to be a law which the honorable manager does not think applicable to the houses of Congress. If there be anything in that suggestion, how should it guard, reduce, and regulate your use of freedom of speech? I have not gone outside of the debates that relate to this civil-tenure act; my time has been sufficiently occupied in reading all that was said in both houses on that subject; but I find now a well-recorded precedent not merely in the observations of a single Senator, but in a direct determination of the Senate itself passing upon the question what certain bounds at least of freedom of speech as between the two departments of the Government permitted. The honorable senator from Massachusetts, in the course of the debate, using this form of expression in regard to the President said, and on the subject of this very law:

You may ask protection, against whom? I answer plainly, protection against the President of the United States. There, sir, is the duty of the hour. Ponder it well, and do not forget it. There was no such duty on our fathers; there was no such duty on our recent predecessors in this chamber, because there was no

President of the United States who had become the enemy of his country. (Congressional Globe, 2d sess. 39th Congress, p. 525.)

The President had said that Congress was "hanging on the verge of the government"; but here is a direct charge that the President of the United States is an enemy of the country. Mr. Sumner being called to order for this expression, the honorable Senator from Rhode Island [Mr. Anthony], who not unfrequently presides with so much urbanity and so much control over your deliberations, gave this aid to us as to what the common law of this tribunal was on the subject of the harmonies and courtesies that should prevail between the legislative and the executive departments. He said:

It is the impression of the Chair that those words do not exceed the usual latitude of debate which has been permitted here.

Is not that a good authority, the custom of the tribunal established by the presiding officer? Mr. Sherman, the honorable Senator from Ohio, said:

I think the words objected to are clearly in order. I have heard similar remarks fifty times without any question of order being raised.

*Communis error facit jus.* That is the principle of this view; and the Senate came to a vote, the opposing numbers of which remind me of some of the votes on evidence that we have had in this trial; the appeal was laid on the table by 29 yeas to 10 nays.

We shall get off pretty easy from a tribunal whose "usual latitude of debate" permits the legislative branch to call the Executive an enemy of his country. But that is not all. Proceeding in the same debate, after being allowed to be in order, Mr. Sumner goes on with a speech, the eloquence of which I cannot be permitted to compliment, as it is out of place, but certainly it is of the highest order, and of course

I make no criticism upon it; but he begins with an announcement of a very good principle:

Meanwhile I shall insist always upon complete freedom of debate, and I shall exercise it. John Milton, in his glorious aspirations, said "Give me the liberty to know, to utter, and to argue freely, above all liberties." Thank God, now that slave-masters have been driven from this chamber, such is the liberty of an American Senator! Of course there can be no citizen of a republic too high for exposure, as there can be none too low for protection. The exposure of the powerful and the protection of the weak—these are not only invaluable liberties but commanding duties.

Is there anything in the President's answer that is nobler or more thoroughgoing than that? And if the President is not too high, but that it should be not only an invaluable liberty but a commanding duty to call him an enemy of the country, may not the House of Representatives be exposed to an imputation of a most unintelligible aspersion upon them that they "hang on the verge of the government"? Then the honorable Senator proceeds with a style of observation upon which I shall make no observation whatever, and I feel none, but Cicero, in *In Catalinam*, *In Verrem*, and in *Pro Milone*, does not contain more eloquence against the objects of his invective than this speech of the honorable Senator. Here are his words:

At last the country is opening its eyes to the actual condition of things. Already it sees that Andrew Johnson who came to supreme power by a bloody accident, has become the successor of Jefferson Davis in the spirit by which he is governed and in the mischief he is inflicting on his country. It sees the president of the rebellion revived in the President of the United States. It sees that the violence which took the life of his illustrious predecessor is now by his perverse complicity extending throughout the rebel States, making all who love the Union its victims and filling the land with tragedy. It sees that the war upon the faithful Unionists is still continued under his powerful auspices, without

any distinction of color, so that all, both white and black, are sacrificed. It sees that he is the minister of discord, and not the minister of peace. It sees that, so long as his influence prevails, there is small chance of tranquillity, security, or reconciliation; that the restoration of prosperity in the rebel States, so much longed for, must be arrested; that the business of the whole country must be embarrassed, and that those conditions on which a sound currency depends must be postponed. All these things the country now sees. But indignation assumes the form of judgment when it is seen also that this incredible, unparalleled, and far-reaching mischief, second only to the rebellion itself, of which it is a continuation, is invigorated and extended through a plain usurpation. . . .

The President has usurped the powers of Congress on a colossal scale, and he has employed these usurped powers in fomenting the rebel spirit and awakening anew the dying fires of the rebellion. Though the head of the executive, he has rapaciously seized the powers of the legislative, and made himself a whole Congress, in defiance of a cardinal principle of republican government that each branch must act for itself without assuming the powers of the others; and in the exercise of these illegitimate powers, he has become a terror to the good and a support to the wicked. This is his great and unpardonable offence, for which history must condemn him if you do not. He is a usurper, through whom infinite wrong has been done to his country. He is a usurper, who, promising to be a Moses, has become a Pharaoh. (Congressional Globe, 2d sess., 39th Congress, p. 541.)

And then it all ends in a wonderfully sensible—if the honorable Senator will allow me to say so—and pithy observation of the honorable Senator from Wisconsin [Mr. Howe]:

The Senator from Massachusetts has advanced the idea that the President has become an enemy to his country. . . . But I suppose that not only to be the condition of the sentiment in this Senate touching the present President of the United States, but I suppose we never had a President who was not in communication with a Senate divided upon just that question, some thinking that he was an enemy of the country and others thinking that he

was not; and I respectfully submit, therefore, that the Senator from Massachusetts will be competent to try an impeachment if it should be sent here against the President, as I conceive the Senator from Maryland would be competent to try that question in spite of the opinion which he has pronounced here. (*Ibid.*, p. 545.)

That is good sense. Senatorial license must, if it goes so wide as this, sometimes with good-natured Senators be properly described as a little Pickwickian.

We have also a rule provided for us in the House of Representatives, and I have selected a very brief one, because it is one that the honorable managers will not question at all, as it gives their standard on the subject. I find that there this rule of license in speech, in a very brief, pithy form, is thus conducted between two of the most distinguished members of that body, who can, as well as any others, for the purpose of this trial, furnish a standard of what is called by the honorable manager "propriety of speech." I read from page 263 of the Congressional Globe for the fortieth Congress, first session:

Mr. Bingham: I desire to say, Mr. Chairman, that it does not become a gentleman who recorded his vote fifty times for Jefferson Davis, the arch traitor in this rebellion, as his candidate for President of the United States, to undertake to damage this cause by attempting to cast an imputation either upon my integrity or my honor. I repel with scorn and contempt any utterance of that sort from any man, whether he be the hero of Fort Fisher not taken or of Fort Fisher taken. [Laughter.]

Now for the reply:

Mr. Butler: But if during the war the gentleman from Ohio did as much as I did in that direction I shall be glad to recognize that much done. But the only victim of the gentleman's prowess that I know of was an innocent woman hung upon the scaffold, one Mrs. Surratt. And I can sustain the memory of Fort Fisher if he and his present associates can sustain him in shedding the blood of a woman tried by a military commission and convicted without sufficient evidence, in my judgment.

To which, on page 364, Mr. Bingham responds with spirit:

I challenge the gentleman, I dare him here or anywhere in this tribunal, or in any tribunal, to assert that I spoliated or mutilated any book. Why, sir, such a charge, without one tittle of evidence, is only fit to come from a man who lives in a bottle and is fed with a spoon. [Laughter.]

Now, what under heaven that means I am sure I do not know, but it is within the common law of courtesy in the judgment of the House of Representatives. We have attempted to show that in the President's addresses to the populace there was something of irritation, something in the subjects, something in the manner of the crowd that excused and explained, if it did not justify, the style of his speech. You might suppose that this interchange in debate grew out of some subject that was irritating, that was itself savage and ferocious; but what do you think was the subject these honorable gentlemen were debating upon? Why, it was charity. The question of charity to the South was the whole staple of the debate; "charity," which "suffereth long and is kind." "Charity envieth not." "Charity vaunteth not itself, is not puffed up." Charity "doth not behave itself unseemly, seeketh not her own, is not easily provoked, thinketh no evil, rejoiceth not in iniquity, but rejoiceth in the truth, beareth all things, believeth all things, hopeth all things, endureth all things; charity never faileth." But, then, the Apostle adds, which I fear might not be proved here, "tongues may fail."

Now, to be serious, in a free republic who will tolerate this fanfaronade about speech-making? "*Quis tulerit Gracchos de seditione querentes?*"

Who will tolerate public orators prating about propriety of speech? Why cannot we learn that our estimate of others must proceed upon general views, and not vary according to particular passions or antipathies? When

Cromwell in his career through Ireland, in the name of the Parliament, had set himself down before the town of Ross and summoned it to surrender, exhausted in its resistance, this Papist community asked to surrender only upon the conditions of freedom of conscience. Cromwell replied: "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that liberty to celebrate the mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted." So, freedom of speech the honorable managers in their imputation do not complain of; but if anybody says that the House of Representatives hangs upon the verge of the Government, we are to understand that in no place where the power of the two houses of Congress prevails shall that degree of liberty be enjoyed, though they meddle with no man's propriety or freedom of speech.

Mr. Jefferson had occasion to give his views about the infractions upon freedom of writing that the sedition law introduced in the legislature of this country, and at the same time some opinion about the right of an Executive to have an opinion about the constitutionality of a law and to act accordingly; and I will ask your attention to brief extracts from his views. Mr. Jefferson, in a letter to Mr. President Adams, written in 1804 (Jefferson's Works, vol. 3, p. 555), says:

I discharged every person under the punishment or prosecution under the sedition law, because I considered and now consider that law to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image, and that it was as much my duty to arrest its execution in every stage as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image. It was accordingly done in every instance, without asking what the offenders had done or against whom they had offended, but



whether the pains they were suffering were inflicted under the pretended sedition law.

And in another letter he replies to some observations against this freedom of the Executive about the constitutionality of laws:

You seem to think it devolved on the judges to decide on the validity of the sedition law; but nothing in the Constitution has given them a right to decide for the Executive more than for the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the Constitution; but the Executive believing the law to be unconstitutional, were bound to remit the execution of it, because that power had been confided to them by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other; but the opinion which gives the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and Executive also in their sphere, would render the judiciary a despotic branch.

We have no occasion and have not asserted the right to resort to these extreme opinions which it is known Jefferson entertained. The opinions of Madison, more temperate but equally thorough, were to the same effect. The co-ordinate branches of the Government must surrender their co-ordination whenever they allow a past rescript to be a final bar to renewing or presenting constitutional questions for reconsideration and redetermination, if necessary, even, by the Supreme Court.

But we have here some instances of the courtesy prevailing in the different branches of the Government in the very severe expression of opinion that Mr. Manager Boutwell indulged in in reference to the heads of departments. That is an executive branch of the Government; and here you are

sitting in these halls, and the language used was as much severer, as much more degrading to that branch of the Government than anything said by the President in reference to Congress as can be imagined. Exception here is taken to the fact that the President called congressmen, it is said, in a telegram, "a set of individuals." We have heard of an old lady not well instructed in long words who got very violent at being called an individual, because she supposed it was opprobrious. But here we have an imputation in so many words that the heads of departments are "serfs of a lord, servants of a master, slaves of an owner." And yet in this very presence sits the eminent Chief Justice of the United States, and the eminent Senator from Maine (Mr. Fessenden), and the distinguished Senator from Pennsylvania (Mr. Cameron), all of whom have held cabinet offices by this tenure, thus decried and derided; and if I were to name the Senators who aspire in the future to hold these degraded positions, I am afraid I should not leave judges enough here to determine this cause. All know that this is all extravagance. "*Est modus in rebus; sunt certi denique fines.*"

There is some measure in things. There is some limit to the bounds of debate and discussion and imputation. I will agree that nothing could be more unfortunate than the language used by the President as offending the serious and religious tastes and feelings of a community, in the observations which he was drawn into by a very faulty method of reasoning, in a speech that he made at St. Louis. The difficulty is, undoubtedly, that the President is not familiar with the graces taught at schools, the costly ornaments and studied contrivances of speech, but that he speaks right on; and when an obstacle is presented in his path he proceeds right over it. But here is a rhetorical difficulty for a man not a rhetorician. An illusive metaphorical suggestion has been made that he is a Judas. If anybody—I do not

care how practiced he is—undertakes to become logical with a metaphor, he will get into trouble at once; and that was the President's difficulty. He looked around with the eye of a logician and said, "Judas's fault was the betrayal of all goodness. Where is the goodness that I have betrayed?" And the moment, therefore, that you seek to be logical by introducing the name of the Divinity against whom he had thus sinned, of course you would produce that offence and shock to our senses which otherwise would not have been occasioned.

I am not entirely sure that when you make allowances for the difference between an *ex tempore* speech of the President to a mob, and a written, prepared, and printed speech to this Court, by an honorable manager, but that there may be some little trace of the same impropriety in that figure of argument which presented Mr. Carpenter to your observation as an inspired painter, whose pencil was guided by the hand of Providence to the apportionment of Mr. Stanton to perpetual bliss, and of Governor Seward to eternal pains. But all that is matter of taste, matter of feeling, matter of discretion, matter of judgment.

The serious views impressed upon you with so much force by the counsel for the President who opened this cause for us, and supported by the quotations from Mr. Madison, present this whole subject in its proper aspect to an American audience. I think that if our newspapers would find some more discriminating scale of comment on speeches than to make the lowest scale "able and eloquent," we should have a better state of things in public addresses.

Our position in regard to the speeches is, that the circumstances produced in truth should be considered, that words put into the speaker's mouth from the calls of the crowd, ideas suddenly raised by their unfriendly and impolite suggestions, are to have their weight, and that without apologizing, for no man is bound to apologize before the law or

before the Court for the exercise of freedom of speech, it may be freely admitted that it would be very well if all men were accomplished rhetoricians, finished logicians, and had a bridle on their tongues.

And now, without pausing at all upon the eleventh article, which I leave to the observations of the honorable managers among themselves to dispose of, I will take up the Emory article. The Emory article is an offence which began and ended on the 22d of February, and is comprised within a half hour's conversation between the President and a general of our armies.

I dare say that in the rapid and heated course of this impeachment through the House of Representatives it may have been supposed by rumor, uncertain and amplified, that there had occurred some kind of military purpose or intention on the part of the President that looked to the use of force; but under these proofs what can we say of it but that the President received an intimation from Secretary Welles that all the officers were being called away from what doubtless is their principal occupation in time of peace, attendance upon levees, were summoned, as they were from the halls of revelry at Brussels to the battle of Waterloo, and it was natural to inquire when and where this battle was to take place; and the President, treating it with very great indifference, said he did not know anything about General Emory, and did not seem to care anything about it; but finally, when Secretary Welles said, "You had better look into it," he did look into it, and there was a conversation which ended in a discussion of constitutional law between the President and the general, in which the general, re-enforced by Mr. Reverdy Johnson, a lawyer, and Mr. Robert J. Walker, a lawyer, actually put down the President entirely! Now, if he ought to be removed from office for that, and a new election ordered for that, you will so determine in your judgment; and if any other

President can go through four years without doing something worse than that, we shall have to be more careful in the preliminary examinations in our nominating conventions. I understand this article to be hardly insisted upon.

Then come the conspiracy articles. The conspiracy consists in this: It was all commenced and completed in writing; the documents were public; they were immediately promulgated, and that is the conspiracy, if it be one. It is quite true that the honorable Manager, who conducted with so much force and skill the examinations of the witnesses, did succeed in proving that besides the written orders handed by the President of the United States to General Thomas, there were a few words of attendant conversation, and those words were, "I wish to uphold the Constitution and the laws," and an assent of General Thomas to the propriety of that course. But by the power of our profession the learned Manager made it evident, by the course of his examination, in which he asked the witness if he had ever heard those words used before when a commission was delivered to him and received for reply that he had not, and that it was not routine, that they carried infinite gravity of suspicion!

What is there that we cannot believe in the power of counsel to affix upon innocent and apparently laudable expressions these infinite consequences of evil surmise, when we remember how, in a very celebrated trial, "chops and tomato sauce" were to go through the service of getting a verdict from a jury on a question of a breach of promise of marriage? Now, "chops and tomato sauce" do not import a promise of marriage; there is not the least savor of courtship nor the least flavor of flirtation, even, in them; but it is in "the hidden meaning." And so "the Constitution and the laws," by these two men, at mid-day, and in writing, entering into a conspiracy, mean, we are told, bloodshed, civil commotion, and war! Well, I

cannot argue against it. Cardinal Wolsey said that in political times you could get a jury that would bring in a verdict that Abel killed Cain; and it may be that an American Senate will find that in this allusion to the Constitution and the laws is found sufficient evidence to breed from it a purpose of commotion and civil war.

But the conspiracy articles have but a trivial foundation to rest upon. Here we have a statute passed at the eve of the insurrection intended to guard the possession of the offices of the United States from the intrusion of intimidation, threats, and force, to disable the public service. It is, in fact, a reproduction of the first section of the sedition act of 1798 somewhat amplified and extended. It is a law wholly improper in time of peace, for, in the extravagance of its comprehension, it may include much more than should be made criminal, except in times of public danger. But the idea that a law intended to prevent rebels at the south, or rebel sympathizers, as they were called, at the north, from intimidating officers in the discharge of their public duty, should be wrested to an indictment and trial of a President of the United States and an officer of the army under a written arrangement of orders to take possession of and administer one of the departments of the Government according to law, is wresting a statute wholly from its application. We are all familiar with the illustration that Blackstone gives us of the impropriety of following the literal words of a statute as against a necessary implication, when he says that a statute against letting blood in the street could not properly support an indictment against a surgeon for tapping the vein of an apoplectic patient who happened to have fallen on the sidewalk. And there is no greater perversity or contrariety in this effort to make this statute applicable to orderly and regular proceedings between recognized officers of the United States in the disposition of an office than there would be in punishing the surgeon for relieving the apoplectic patient.

I did not fully understand, though I carefully attended to, the point of the argument of the learned Manager [Mr. Boutwell], who, with great precision and detail, brought into view the common law of Maryland as adopted by Congress for the Government in the domestic and ordinary affairs of life of the people in this District; but if I did rightly understand it, it was that, though there was nothing in the penal code of the District, and although the act of 1801 did not attempt to make a penal code for the District, yet somehow or other it became a misdemeanor for the President of the United States, in his official functions, to do what he did do about this office, because it was against the common law of Maryland as applied in this District.

I take it that I need not proceed on this subject any further. The common law has a principle that when the common law stigmatizes a *malum in se* and a felony it may be a misdemeanor at common law to attempt it and to use the means. But the idea that when a statute makes *malum prohibitum*, and affixes a punishment to it if executed the common law adds to that statutory *malum prohibitum* and punishment a common law punishment, for attempting it, when the statute itself has not included an attempt within it, I apprehend is not supported by any authority or any view of the law; and I must think that it cannot be supposed in the high forum of a court of impeachment as making a high crime and misdemeanor, that the President of the United States, in determining what his powers and duties were in regard to filling offices, should have looked into the common law of the District of Columbia because the offices are inside of the District.

Then, upon the views presented of the conspiracy articles, let us see what the evidence is. There was no preparation or meditation of force; there was no application of force; there was no threat of force authorized on the part of the President; and there was no expectation of force, for he

expected and desired nothing more and nothing less than that, by the peaceful and regular exercise of authority on his part, through the ordinary means of its exercise, he should secure obedience, and if, disappointed in that, obedience should not be rendered, all that the President desired or expected was that, upon that legal basis thus furnished by his official action, there should be an opportunity of taking the judgment of the courts of law.

Now, there seems to be left nothing but those articles that relate to the *ad interim* appointment of General Thomas and to the removal of Mr. Stanton. I will consider the *ad interim* appointment first, meaning to assume, for the purpose of examining it as a possible crime, that the office had been vacated and was open to the action of the President. If the office was full, then there could be no appointment by the authority of the President or otherwise. The whole action of the President manifestly was based upon the idea that the office was to be vacated before an *ad interim* appointment could possibly be made, or was intended to take effect.

The letter of authority accompanied the order of removal and was, of course, secondary and ancillary to the order of removal, and was only to take up the duties of the office and discharge them if the Secretary of War should leave the office in need of such temporary charge.

I think that the only circumstance we have to attend to before we look precisely at the law governing *ad interim* appointments is some suggestion as to any difference between *ad interim* appointments during the session of the Senate and during the recess. The honorable Managers, perhaps all of them, but certainly the honorable Manager, Mr. Boutwell, has contended that the practice of the Government in regard to removals from office covered only the case of removals during the recess of the Senate. It will be part of my duty and labor when I come to consider definitely the



question of the removal of Mr. Stanton to consider that point, but for the purpose of General Thomas's appointment no such discrimination needs to be made. The question about the right of the Executive to vacate an office, as to be discriminated between recess and session, arises out of the constitutional distinction that is taken, to wit: that he can only fill an office during session by and with the advice and consent of the Senate, and that he can during the recess, commission—it is not called filling the office, or appointing,—but commission by authority, to expire with the next session.

But *ad interim* appointments do not rest upon the Constitution at all. They are not regarded, they never have been regarded as an exercise of the appointing power in the sense of filling an office. They are regarded as falling within either the executive or legislative duty of providing for a management of the duties of the office before an appointment is or can properly be made. In the absence of legislation it might be said that this power belonged to the Executive; that a part of his duty was, when he saw that accident had vacated an office or that necessity had required a removal, under his general authority and duty to see that the laws are executed, he should provide that the public service should be temporarily taken up and carried on. I do not think that that is an inadmissible constitutional conclusion.

But it might equally well be determined that it was a *casus omissus*, for which the Constitution had provided no rules and which the legislation of Congress might properly occupy. From the beginning, therefore, as early as 1792 and 1789, indeed, provision is made for temporary occupation of the duties of an office, and the course of legislation was this: the eighth section of the act of 1792, regulating three of the departments, provided that temporary absence and disabilities of the heads of departments, leaving the office still full, might be met by appointments of temporary per-

sons to take charge. The act of 1795 provided that in case of a vacancy in the office there might be power in the Executive which would not require him to fill the office by the constitutional method but temporarily to provide for a discharge of its duties. Then came the act of 1863, which in terms covers to a certain extent but not fully both of these predicaments; and I wish to ask your attention to some circumstances in regard to the passage of that act of 1863. I have said that the eighth section of the act of 1792 provides for filling temporarily, not vacancies, but disabilities. In January, 1863, the President sent to Congress this brief message, and Senators will perceive that it relates to this particular subject:

*To the Senate and House of Representatives:*

I submit to Congress the expediency of extending to other departments of the government the authority conferred on the President by the eighth section of the act of the 8th of May, 1792, to appoint a person to temporarily discharge the duties of Secretary of State, Secretary of the Treasury, and Secretary of War, in case of the death, absence from the seat of government, or sickness of either of those officers.

ABRAHAM LINCOLN.

Washington, January 2, 1863.

That is to say, the temporary disability provision of the act of 1792, which covered all the departments then in existence, had never been extended by law to cover the other departments, and the President desired to have that act extended. The act of 1795 did not need to be extended, for it covered "vacancies" in its terms and was applicable to other departments, and vacancies were not in the mind of the President, nor was there any need of a provision of law for them. This message having been referred to the Judiciary Committee, the honorable Senator from Illinois [Mr. Trumbull], the chairman of that committee, made a very

brief report; I believe this is the whole of it, or rather a brief statement in his place concerning it, in which he said:

There have been several statutes on the subject, and as the laws now exist the President of the United States has authority temporarily to fill the office of Secretary of State and Secretary of War with one of the other Secretaries by calling some person to discharge the duties.

The other department was the Treasury.

We received communications from the President of the United States asking that the law be extended to the other executive departments of the government, which seems to be proper; and we have framed a bill to cover all of those cases, so that whenever there is a vacancy the President may temporarily devolve the duty of one of the cabinet ministers on another cabinet minister, or upon the chief officer in the department for the time being.

Here there does not seem to have been brought to the notice in terms of the Senate or of the honorable Senator the act of 1795; nothing is said of it; and it would appear, therefore, as if the whole legislation of 1863 proceeded upon the proposition of extending the act of 1792 as to disabilities in office, not vacancies, except that the honorable Senator uses the phrase "vacancies," and that he speaks of having provided for the occasions that might arise. The act of 1863 does not cover the case of vacancies except by resignation, and it is not therefore, a vacancy act in full. It does add to the disabilities which the President had asked to have covered, a case of resignation which he did not ask to have covered, and which did not need to be covered by new legislation, because the act of 1795 embraced it. But this act of 1863 does not cover all the cases of vacancy. It does not cover vacancies by removal, if removal could be made and we supposed it could in 1863; it does not cover the case of expiration of office, which is a case of vacancy, provided there are terms to office.

Under that additional light it seems as if the only question presented of guilt on the part of the President in respect to the appointment to office *ad interim* was a question of whether he violated a law. But Senators will remark the very limited form in which that question arises. It is not pretended that the appointment of Thomas, if the office was vacant, was a violation of the civil-tenure act; that is, it is not pretended in argument, although perhaps it may be so charged in the articles; because an examination of the act shows that the only appointments prohibited there, and the infringement of which is made penal, is appointing contrary to the provisions of that act, as was pointed out by my colleague, Judge Curtis, and seems to have been assented to in the argument on the other side; that an appointment prohibited, or an attempt at an appointment prohibited, relates to the infraction of the policy and provisions of that act as applied to the attempt to fill the offices that are declared to be in abeyance under certain predicaments. I believe that to be a sound construction of the law, whether assented to or not, not to be questioned anywhere.

Very well, then, supposing that the appointment of General Thomas was not according to law, it is not against any law that prohibits it in terms, nor against any law that has a penal clause or a criminal qualification upon the act. What would it be if attempted without authority of the act of 1795, because that was repealed, and without authority of the act of 1863, because General Thomas was not an officer that was eligible for this temporary employment? It would simply be that the President, in the confusion among these statutes, had appointed, or attempted to appoint, an *ad interim* discharge of the office without authority of law. You could not indict him very well for it, and I do not think you can impeach him for it. There are an abundance of mandatory laws upon the President of the United States, and it never has been customary to put a penal clause in them till the civil-tenure act of 1867.

But on this subject, the *ad interim* appointments, there is no penal clause and no positive prohibition in any statute. There would be, then, simply a defect of authority in the President to make the appointment. What, then, would be the consequence? General Thomas might not be entitled to discharge the duties of the office; and if he had undertaken to give a certificate as Secretary *ad interim* to a paper that was to be read in evidence in a Court, and a lawyer had objected that General Thomas was not Secretary *ad interim*, and had brought the statutes, the certificate might have failed. That is all that can be claimed or pretended in that regard.

But we have insisted, and we do now insist, that the act of 1795 was in force; and that whether the act of 1795 was or was not in force, is one of those questions of dubious interpretation of implied repeal upon which no officer, humble or high, could be brought into blame for having an opinion one way or the other. And if you proceed upon these articles to execute a sentence of removal from office of a President of the United States, you will proceed upon an infliction of the highest possible measure of civil condemnation upon him personally, and of the highest possible degree of interference with the constitutionally elected Executive dependent on suffrage that it is possible for a Court to inflict, and you will rest it on the basis either that the act of 1795 was repealed, or upon the basis that there was not a doubt or difficulty or an ignorance upon which a President of the United States might make an *ad interim* appointment of General Thomas for a day, followed by a nomination of a permanent successor on the succeeding day. Truly, indeed, we are getting very nice in our measure and criticism of the absolute obligations and of the absolute acuteness and thoroughness of executive functions when we seek to apply the process of impeachment and removal to a question whether an act of Congress required him to name a head of a depart-

ment to take the vacant place *ad interim* or an act of Congress not repealed permitted him to take a suitable person. You certainly do not, in the ordinary affairs of life, rig a trip-hammer to crack a walnut.

I think, Mr. Chief Justice, that I shall be able to conclude what I may have to say to the Senate further certainly within the compass of an hour; and as the customary hour of adjournment has been reached, I may, perhaps, be permitted to say that I feel somewhat sensibly the impression of a long argument.

FOURTH DAY, MAY 1, 1868.

Mr. Chief Justice and Senators, I cannot but feel that, notwithstanding the unfailing courtesy and the long-suffering patience which for myself and my colleagues I have every reason cheerfully to acknowledge on the part of the Court in the progress of this trial and in the long argument, you had at the adjournment yesterday reached somewhat of the condition of feeling of a very celebrated judge, Lord Ellenborough, who, when a very celebrated lawyer, Mr. Fearn, had conducted an argument upon the interesting subject of contingent remainders to the ordinary hour of adjournment, and suggested that he would proceed whenever it should be his lordship's pleasure to hear him, responded, "The Court will hear you, sir, to-morrow; but as to pleasure, that has been long out of the question."

Be that as it may, duties must be done, however arduous, and certainly your kindness and encouragement relieve from all unnecessary fatigue in the progress of the cause. We will look for a moment, under the light which I have sought to throw upon the subject, a little more particularly at the two acts, the one of 1795 and the other of 1863, that have relation to this subject of *ad interim* appointments. The act of 1795 provides:

That in case of vacancy in the office of Secretary of State,

Secretary of the Treasury, or of the Secretary of the Department of War, or of any officer of either of the said departments, whose appointment is in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancy be filled: *Provided*, That no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

The act of 1863, which was passed under a suggestion of the President of the United States, not for the extension of the vacancy act which I have read to the other departments, but for the extension of the temporary-disability provision of the act of 1792, does provide as follows:

In case of the death, resignation, absence from the seat of government, or sickness of the head of any executive department of the Government or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize—

Not “any person or persons,” as is the act of 1795, but—to authorize the head of any other executive department or other officer in either of said departments whose appointment is vested in the President, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence or disability by sickness shall cease: *Provided*, That no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

It will be observed that the eighth section of the act of 1792, to which I will now call attention, being in 1 Statutes at Large, page 281, provides thus:

That in case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury,

or of the Secretary of the War Department, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.

I am told, or I understand from the argument, that if there was a vacancy in the office of Secretary of War by the competent and effective removal of Mr. Stanton by the exercise of the President's authority in his paper order, there has come to be some infraction of law by reason of the President's designating General Thomas to the *ad interim* charge of the office, because it is said that though under the act of 1795, or under the act of 1792, General Thomas, under the comprehension of "any person or persons," might be open to the presidential choice and appointment, yet that he does not come within the limited and restricted right of selection for *ad interim* duties which is imposed by the act of 1863; and it seems to have been assumed in the argument that the whole range of selection permitted under that act was of the heads of departments. But your attention is drawn to the fact that it permits the President to designate any person who is either the head of a department, or who holds any office in any department the appointment of which is from the President; and I would like to know why General Thomas, Adjutant General of the armies of the United States, holding his position in that Department of War, is not an officer appointed by the President, and open to his selection for this temporary duty; and I would like to know upon what principle of ordinary succession or recourse for the devolution of the principal duty any officer could stand better suited to assume for a day or for a week the discharge of the *ad interim* trust than the Adjutant General of the



armies of the United States, being the staff officer of the President, and the person who stands there as the principal director and immediate agent of the War Department in the exercise of its ordinary functions?

I cannot but think it is too absurd for me to argue to a Senate that the removal of a President of the United States should not depend upon the question whether an Adjutant General was a proper *locum tenens* or not, or whether entangled between the horns of the repealed and unrepealed statutes the President may have erred in that on which he hung his rightful authority.

Let me now call your attention to an exercise of this power of *ad interim* appointment as held in the administration of President Lincoln, at page 582 of the record, before the enactment of the statute of 1863. You will observe that before the passing of the act of 1863 there was in force no statutory authority for the appointment of *ad interim* discharge of the offices except the acts of 1792 and 1795, which were limited in their terms to the Departments of War, of State, and of the Treasury. You have, therefore, directly in this action of President Lincoln the question of *ultra vires*, not of an infraction of a prohibitory statute with a penalty, but of an assumption to make an appointment without the adequate support of an enabling act of Congress to cover it, for he proceeded, as will be found at the very top of that page:

I hereby appoint St. John B. L. Skinner, now acting First Assistant Postmaster General, to be acting Postmaster General *ad interim*, in place of Hon. Montgomery Blair, now temporarily absent.

ABRAHAM LINCOLN.

Washington, September 22, 1862.

The Department of the Post Office was not covered by the acts of 1792 or 1795, and the absence of authority in

respect to it and the other later organized departments formed the occasion of the President's message which led to the enactment of 1863. I would like to know whether, when President Lincoln appointed Mr. Skinner to be Postmaster General, without an enabling and supporting act of Congress to justify him, he deserved to be impeached, whether that was a crime against the Constitution and his oath of office, whether it was a duty due to the Constitution that he should be impeached, removed, and a new election ordered?

I cannot but insist upon always separating from these crimes alleged in articles the guilt that is outside of articles and that has not been proved, and that I have not answered for the respondent nor have been permitted to rebut by testimony. I take the thing as it is, and I regard each article as including the whole compass of a crime, the whole range of imputation, the whole scope of testimony and consideration; and unless there be some measure of guilt, some purpose, or some act of force, of violence, of fraud, of corruption, of injury, of evil, I cannot find in mistaken, erroneous, careless, or even indifferent excesses of authority making no impression upon the fabric of the government, and giving neither menace nor injury to the public service, any foundation for this extraordinary proceeding of impeachment.

Am I right in saying that an article is to contain guilt enough in itself for a verdict to be pronounced by the honorable members of the court "guilty" or "not guilty" on that article; guilty, not of an act as named, but "guilty of a high crime and misdemeanor as charged," and as the form of question adopted in the Peck and Chase trials is distinctly set down, and not the question used in the Pickering trial for a particular purpose, which has led the honorable manager [Mr. Wilson], to denounce it as a mockery of justice, a finding of immaterial facts, leaving no conclusions of law or judgment to be found by anybody.

There is another point of limitation on the authority of the President, as contained both in the act of 1795 and of 1863, which has been made the subject of some comment by the learned and honorable manager [Mr. Boutwell]: it is that anyhow and anyway the President has been guilty of a high crime and misdemeanor, however innocent otherwise, because the six months' ability accorded to him by the act of 1795 or 1863 had already expired before he appointed General Thomas.

The reasoning I do not exactly understand; it is definitely written down and the words have their ordinary meaning, I suppose; but how it is that the President is chargeable with having filled a vacancy thus occurring on the 21st of February, 1868, if it occurred at all, by an appointment that he made *ad interim* on that day which was to run in the future, what the suggestion that the six months' right had expired rests upon, I do not understand. It is attempted to connect it in some way with a preceding suspension of Mr. Stanton under the civil-tenure act, which certainly did not create a vacancy in the office, as by law it was prohibited from doing, nor did it create in any form or manner a vacancy in the office. No matter, then, whether the suspension was under the civil-tenure-office act or the act of 1795, the office was not vacant until the removal; and whatever there may have been wanting in authority in that preceding action of the President as not sufficiently supported by his constitutional authority to suspend, which he claims, and as covered necessarily by the act of 1867, as is argued on the part of the managers, I cannot see that it has anything to do with cutting short the term during which it was competent for the President to make an *ad interim* appointment.

There remains nothing to be considered except about an *ad interim* appointment as occurring during the session of the Senate. An effort has been made to connect a discrimination between the session and the recess of the Senate in its

operation upon the right of *ad interim* or temporary appointments, with the discrimination which the Constitution makes between the filling of an office during the session and the limited commission which is permitted during the recess. But sufficiently, I imagine, for the purposes of conviction in your minds, it has been shown that temporary appointment does not rest upon the constitutional provisions at all; that it is not a filling of the office, which remains just as vacant, as far as the constitutional right and duty remains or is divided in the different departments of the government, as if the temporary appointment had not been made. When the final appointment is made, it dates as from the time of the vacancy, and to supply the place of the person, whose vacancy led to the *ad interim* appointment. That in the very nature of things there should be no difference in this capacity between recess and session sufficiently appears, and the acts of Congress draw no distinction, and the practice of the government makes not the least difference.

We are able to present to your notice on the pages of this record, cases enough applicable to the very heads of departments to make it unnecessary to argue the matter upon general principles any further. Mr. Nelson, on the 29th of February, 1844, was appointed *ad interim* in the State Department during the session of the Senate. This is to be found on page 556. General Scott was appointed in the War Department July 23, 1850, page 537, during the session of the Senate; Moses Kelly, Secretary of the Interior, January 10, 1861, during the session of the Senate, at page 558; and Joseph Holt, Secretary of War, on the 1st of January, 1861, during the session of the Senate, at page 583. Whether these were to fill vacancies or for temporary disabilities makes no difference on the question; nor how the vacancy arose, whether by removal or resignation or death.

The question of the *ad interim* faculty of appointment depends upon no such considerations. They were actual

vacancies filled by *ad interim* appointment, and related, all except that of Moses Kelly, to departments that were covered by the legislation of 1792 and 1795. That of Moses Kelly to the Department of the Interior was not covered by that legislation, and would come within the same principle with the appointment of Mr. Skinner which I have noticed on page 582.

I now come with the utmost confidence, as having passed through all possible allegations of independent infraction of the statute, to the consideration of the removal of Mr. Stanton as charged as a high crime and misdemeanor in the first article, and as to be passed upon by this court under that imputation and under the President's defence. The crime as charged must be regarded as the one to be considered, and the crime, as charged and also proved, to be the only one upon which the judgment has to pass. Your necessary concession to these obvious suggestions relieves, very much of any difficulty and of any protracted discussion, this very simple subject as it will appear to be.

Before taking up the terms of the article and the consideration of the facts of the procedure I ask your attention now, for we shall need to use them as we proceed, to some general light to be thrown, both upon the construction of the act by the debates of Congress and upon the relation of the cabinet as proper witnesses or proper aids in reference to the intent and purpose of the President within the practice of this government, and with the latter, first.

Most extraordinary (as I think) views have been presented in behalf of the House of Representatives in relation to cabinet ministers. The personal degradation fastened upon them by the observation of the honorable manager [Mr. Boutwell] I have sufficiently referred to; but I recollect that there are in your number two other honorable senators, the honorable senator from Maryland [Mr. Johnson] and the honorable senator from Iowa [Mr. Harlan] who must

take their share of the opprobrium which yesterday I divided among three members of this court alone.

But as a matter of constitutional right, of ability of the President to receive aid and direction from these heads of departments, it has been presented as a dangerous innovation, of a sort of Star Chamber council, I suppose, intruded into the Constitution, that was to devour our liberties. Well, men's minds change rapidly on all these public questions, and perhaps some members of this honorable Senate may have altered their views on that point from the time of the date of the paper I hold in my hand, to which I wish to ask your attention. It is a representation that was made to Mr. President Lincoln by a very considerable number of senators as to the propriety of his having a cabinet that could aid him in the discharge of his arduous executive duties:

The theory of our government, the early and uniform practical construction thereof, is that the President should be aided by a cabinet council agreeing with him in political principle and general policy, and that all important measures and appointments should be the result of their combined wisdom and deliberation. The most obvious and necessary condition of things, without which no administration can succeed, we and the public believe does not exist; and, therefore, such selections and changes in its members should be made as will secure to the country unity of purpose and action in all material and essential respects. More especially in the present crisis of public affairs the cabinet should be exclusively composed of statesmen who are cordial, resolute, unwavering supporters of the principles and purposes above mentioned.

There are appended to this paper as it comes to me the signatures of twenty-five senators. Whether it was so signed or not I am not advised; but that it was the action of those senators, I believe, is not doubted, and among them there are some fifteen or more that are members of this present court. The paper has no date, but the occurrence was, I

think, some time in the year 1862 or 1863, a transaction and a juncture which is familiar to the recollection of senators who took part in it, and doubtless of all the public men whom I have the honor now to address.

These honorable managers in behalf of the House of Representatives do not hold to these ideas at all, and I must think that the course of this court in its administration of the laws of evidence as not enabling the President to produce the supporting aid of his cabinet, which you said he ought to have in all his measures and views, has either proceeded upon the ground that his action, in your judgment, did not need any explanation or support, or else you had not sufficiently attended to these valuable and useful views about a cabinet which were presented to the notice of President Lincoln. Public rumor has said, the truth of which I do not vouch, as I have no knowledge, but there are many who well know that the President rather turned the edge of this representation, by a suggestion whether in fact the meaning of the honorable senators was not that his cabinet should agree with them rather than with him, Mr. Lincoln. However that may be, the doctrines are good and are according to the custom of the country and the law of our government.

We may then find it quite unnecessary to refute by any very serious and prolonged argument the imputations and invectives against cabinet agreement with the President which have been urged upon your attention.

And now, as bearing both on the question of a fair right to doubt and deliberate on the part of the President on the constitutionality of this law, the civil-tenure act, and on the construction of its first section as embracing or not embracing Mr. Stanton, I may be permitted to attract your attention to some points in the debates in the Congress which have not yet been alluded to, as well as to repeat some very brief quotations which have once been presented to your attention. I will not recall the history of the action of the

House on the general frame and purpose of the bill, nor the persistence with which the Senate, as the adviser of the President in the matters of appointment as well as a member of the legislative branch of the government, pressed the exclusion of cabinet ministers from the purview of the bill altogether; but when it was found that the House was persistent also in its view, the Senate concurred with it on conference in a measure of accommodation concerning this special matter of the cabinet which is now to be found in the text of the first section of the act. In the debate on the tenure-of-office bill the honorable senator from Oregon [Mr. Williams], who seems to have had, with the honorable senator from Vermont [Mr. Edmunds], some particular conduct of the debate according to a practice apparently quite prevalent now in our legislative halls, said this:

I do not regard the exception as of any great practical consequence—

That is, the exception of cabinet ministers—

because, I suppose, if the President and any head of a department should disagree, so as to make their relations unpleasant, and the President should signify a desire that that head of department should retire from the cabinet, that would follow without any positive act of removal on the part of the President. (Congressional Globe, 39th Congress, second session, p. 383.)

Mr. Sherman, bearing on the same point, said:

Any gentleman fit to be a cabinet minister, who receives an intimation from his chief that his longer continuance in that office is unpleasant to him, would necessarily resign. If he did not resign, it would show he was unfit to be there. I cannot imagine a case where a cabinet officer would hold on to his place in defiance and against the wishes of his chief. (*Ibid.*, p. 1046.)

But, nevertheless, this practical lack of importance in the measures which induced the Senate to yield their opinions



of regularity of governmental proceedings and permit a modification of the bill, led to the enactment as it now appears; and the question is how this matter was understood, not by one man, not by one speaker, but, so far as the record goes, by the whole Senate, on the question of construction of the act as inclusive of Mr. Stanton in his personal incumbency of office or not. When the conference committee reported the section as it now reads, as the result of a compromise between the Senate in its firm views and the House in its firm purposes, the honorable senator from Michigan [Mr. Howard] asked that the proviso might be explained. Now, you are at the very point of finding out what it means when a senator gets so far as to feel a doubt, and wants to know and asks those who have charge of the matter and are fully competent to advise him. The honorable senator, Mr. Williams, states:

Their terms of office shall expire when the term of office of the President *by whom they were* appointed expires.

I have, from the beginning of this controversy, regarded this as quite an immaterial matter, for I have no doubt that any cabinet minister who has a particle of self-respect—and we can hardly suppose that any man would occupy so responsible an office without having that feeling—would decline to remain in the cabinet after the President had signified to him that his presence was no longer needed. As a matter of course, the effect of this provision will amount to very little, one way or the other; for I presume that whenever the President sees proper to rid himself of an offensive or disagreeable cabinet minister, he will only have to signify that desire, and the minister will retire, and a new appointment be made. (*Ibid.*, p. 1515.)

Mr. Sherman, one of the committee of conference, states:

I agreed to the report of the conference committee with a great deal of reluctance.

I think that no gentleman, no man of any sense of honor, would hold a position as a cabinet officer after his chief desired his re-

moval, and, therefore, the slightest intimation on the part of the President would always secure the resignation of a cabinet officer. For this reason I do not wish to jeopard this bill by an unimportant and collateral question.

He proceeds further:

The proposition now submitted by the conference committee—

And this was in answer to the demand of the Senate to know from the committee what they had done, and what the operation of it was to be. The answer of Mr. Sherman is:

The proposition now submitted by the conference committee is that a cabinet minister shall hold his office during the *life* or *term* of the President who appointed him. *If the President dies the cabinet goes out; if the President is removed for cause by impeachment the cabinet goes out; at the expiration of the term of the President's office the cabinet goes out.*

This is found at page 1515 of the *Globe* of that year. Now, how in the face of this can we with patience listen to long arguments to show that, in regard to cabinet ministers situated as Mr. Stanton is, the whole object of limitation of the proviso and the bill to which the Senate was ready to assent becomes nugatory and unprotective of the President's necessary right, by a constructive enforcement against him of a continuing cabinet officer whom he never appointed at all? And how shall we tolerate this argument that the term of a President lasts after he is dead, and that the term in which Mr. Stanton was appointed by Mr. Lincoln lasts through the succeeding term to which Mr. Lincoln was subsequently elected? But that is not the point. You are asked to remove a President from office under the stigma of impeachment for crime, to strike down the only elected head of the government that the actual circumstances permit the Constitution to have recourse to, and to assume to yourselves the sequestration and administration of that office *ad interim* upon the guilt of a President in thinking that Mr.

Sherman, in behalf of the conference committee, was right in explaining to the Senate what the conference committee had done. Nobody contradicted him; nobody wanted any further explanation; nobody doubted that there was no vice or folly in this act that, in undertaking to recognize a limited right of the President not to have ministers retained in office that he had not had some voice in appointing, gave it the shape, and upon these reasons, that it bears to-day.

And I would like to know who it is, in this honorable Senate, that will bear the issue of the scrutiny of the revising people of the United States, on a removal from office of the President for his removal of an officer, that the Senate has thus declared not to be within the protection of the civil-tenure act. Agree that, judicially, afterward it may be determined anywhere that he is, who will pronounce a judgment that it is wrong to doubt? *Ego assentior eo*, the President might well say, in deference to the opinion of Mr. Sherman, even if that judgment of some inferior court, to say nothing even of the highest, the Supreme Court, or the highest special jurisdiction, this court, should determine otherwise.

But the matter was brought up a little more distinctly. Mr. Doolittle having said that this proviso would not keep in the Secretary of War and that that had been asserted in debate as its object, Mr. Sherman, still having charge of the matter, as representing the conference committee, proceeds:

That the Senate had no such purpose was shown by its vote twice to make this exception. That this provision does not apply to the present case is shown by the fact that its language is so framed as *not to apply to the present President*. The senator shows that himself, and argues truly that it would not prevent the present President from removing the Secretary of War, the Secretary of the Navy, and the Secretary of State. And if I supposed that either of these gentlemen was so wanting in manhood, in honor, as to hold his place after the politest intimation by the President of the United States that his services were no longer

needed, I, certainly, as a senator, would consent to his removal, and so would we all.

That is at page 1516 of the Globe; and yet later, in continuation of the explanation, the same honorable senator says thus definitely:

We provide that a cabinet minister shall hold his office, not for a fixed term, *not* until the Senate shall consent to his removal, *but as long as the power that appoints him holds office. If the principal office is vacated, the cabinet minister goes out.* (Page 1517.)

And if the principal office is not vacated by death under our government, we certainly belong to the race of the immortals. Now, Senators, I press upon your consideration the inevitable, the inestimable weight of this senatorial discussion and conclusion. I do not press it upon particular senators who took part in it, especially. I press it upon the concurring, unresisting, assenting, agreeing, confirming, corroborating silence of the whole Senate. And I would ask if a President of the United States and his cabinet, having before them the question upon their own solution of the ambiguities or difficulties, if there be any (and I think there are not), in this section, might not well repose upon the sense of the Senate that they would not have agreed to the bill if it had any such efficacy as is now pretended for it, and the explanation of the committee, and the acceptance of it by the Senate that it had no such possible construction or force. Nevertheless if the President must be convicted of a high crime and misdemeanor for this concurrence with your united judgments, and that sentence proceeds also from your united judgments, we shall have great difficulty in knowing which of your united judgments is entitled to the most regard.

In the House this matter was considered in the statements of Mr. Schenck, who with Mr. Williams and Mr. Wilson, now among the managers, constituted the conference committee, Mr. Williams having been, as is well known, one of

the principal promoters of the original measure. Mr. Schenck states upon a similar inquiry made in the House as to what they had all done on conference:

A compromise was made by which a further amendment is added to this portion of the bill, so that the term of office of the heads of departments shall expire with the term of the President who appointed them, allowing those heads of departments one month longer, in which in case of death or otherwise, other heads of departments can be named. This is the whole effect of the proposition reported by the committee of conference.

And again:

Their terms of office are limited, as they are not now limited, by law, so that they expire with the term of service of the President who appoints them and one month after. (Congressional Globe, second session thirty-ninth Congress, page 1340.)

Not the elected term, but "the term of service"; and if removal by impeachment terminates the term of service, as it certainly does, or death by a higher power equally terminates it, upon Mr. Schenck's view, in which apparently Messrs. Managers Wilson and Williams concurred, the House is presented as coming to the same conclusion with the Senate. Nevertheless, the whole grave matter left of crime is an impeachment by the House for making the removal, and a condemnation sought from the Senate upon the same ground; and we are brought, therefore, to a consideration of the meaning of the act, of its constitutionality, of the right of the President to put its constitutionality in issue by proper and peaceful proceedings, or of his right to doubt and differ on the construction, and honestly, peacefully to proceed, as he might feel himself best advised, to learn what it truly meant.

And now I may here at once dispose of what I may have to say definitely in answer to some proposition insisted upon by the honorable manager [Mr. Boutwell]. He has under-

taken to disclose to you his views of the result of the debate of 1789, and of the doctrines of the government as there developed, and has not hesitated to claim that the limitation of those doctrines was confined to appointments during the recess of the Senate. Nothing could be less supported by the debate or by the practice of the government. In the whole of that debate, from beginning to end, there is not found any suggestion of the distinction that the honorable manager has not hesitated to lay down in print for your guidance as its result. The whole question was otherwise, whether or no the power of removal resided in the President absolutely. If it did, why should he not remove at one time as well as at another? The power of appointment was restricted in the Constitution by a distinction between recess and session. If, on the other hand, the power of removal was administrable by Congress, it needed to provide for its deposit with the President, if that was the idea, as well in time of session as in time of recess, because the whole question and action of the separate exercise of the power of removal from the power of appointment would arise when the emergency of removal dictated instant action. We understand that when the removal is political, or on the plan of rotation in office, as we call it, the whole motive of the removal is the new appointment.

The new appointment is the first thought and wish. There is no desire to get rid of the old officer except for the purpose of getting in the new. And therefore the general practice of the government in its mass of action, since the time of rotation in office began, is of this political removal, which is not getting rid of the old officer from any objection to him, but because his place is wanted for the new. Hence all this parade of the action of the government showing that it has been the habit in those political appointments to send in the name of the new man, and by that action put him in the place of the old, serves no purpose of argument, and carries

not a penny's weight on the question. The form of the notice as in the last one on your table, the appointment of General Schofield, and so from the beginning of the office, is "in place of A B," not "to be removed by the Senate," but "of A B, removed," meaning this: "I, as President, have no power to appoint unless there is a vacancy; I tell you that I have made a vacancy or present to you a case of vacancy created by my will, by removal, not death or resignation; and I name to you C D to be appointed in the place of A B, removed." That is the meaning of that action of the government.

You will observe that in finding cases in the practice of the government where there has been a separate act of removal during session, or during recess either, we are under two necessary restrictions as to their abundance or frequency, which the nature of the circumstances imposes. The first is that in regard to cabinet officers you can hardly suppose an instant in which a removal can be possible, because in the language of honorable senators, you can hardly conceive of the possibility of a cabinet officer's not resigning when it is intimated to him that his place is wanted; and, therefore, all this tirade of exultation that we found no case of removal of a cabinet officer save that of Timothy Pickering rests upon Senator Sherman's proposition and Senator Williams's proposition that you cannot conceive of the possibility of there being a cabinet minister that would need to be removed, and the practice of our government has shown that these honorable senators were right in their proposition, and that there never have been, from the foundation of the government to the present time, but two cases where there were cabinet ministers that on the slightest intimation of their chief did not resign. Now, do not urge on us the paucity of the cases of removal of heads of departments as not helping the practice of the government when that paucity rests upon retirement whenever a President desires it.

Mr. Pickering, having nothing but wild land for his support and a family to sustain, flatly told Mr. Adams that he would not resign, because it would not be convenient for him to make any other arrangements for a living until the end of his term; and the President, without that consideration of domestic reasons which perhaps Mr. Pickering hoped would obtain with him, told him that he removed him, and he did; and he went, I believe, to his wild land and was imprisoned there by the squatters, and came into very great disaster from this removal. Mr. Stanton, under the motives of public duty, it is said, takes the position that for public reasons he will not resign. These are the only two cases in our government in which the question has arisen, and in one of them, before the passage of the civil-tenure act, the Secretary was instantly removed by the power of the President, and in the other it was attempted after long sufferance.

We can find in the history of the government—for we should hardly expect to escape the occurrence when we have so many officers—instances enough of removal by Executive authority during the session of the Senate of subordinate officers of the government who derived their appointment from the President, by the advice and consent of the Senate, and every one of those cases is pertinent and an instance. You will observe in regard to them, as I said before, how peculiar must be the situation of the officer and office and of the President toward them when this separate, independent, and condemnatory removal needs to take place. In the first place, there must be some fault in the conduct of the officer, not necessarily crime, and not necessarily neglect of office, but some fault in manner at least, as of that collector down in Alabama, who, when he was asked by the Secretary of the department how far the Tombigbee ran up, answered that it did not run up at all; and he was removed from office for his joke on the subject of the Tombigbee river not running up, but, as other rivers do, running down.



It does not do to have these asperities on the part of inferior officers. So, too, when the fault arises of peculation, of deficiency of funds, or what not, the sureties know of it, come forward and say to the officer, "You must resign; we cannot be sureties any longer here"; and in nine cases out of ten, where an occurrence would lead to removal, it is met by the resignation of the inferior officer. Therefore the practice of the government can expect to suggest only the peculiar cases where promptitude and necessity of the rough method of removal are alike demanded from the Executive. I will ask the attention of this honorable court to the cases we have presented in our proofs, with the page and instance of each removal during the session of the Senate. That is the condition of this list—the whole of it:

	Year	Page
Timothy Pickering.....	1800	357
Thomas Eastin, navy agent at Pensacola.....	1840	569
Isaac Henderson, navy agent.....	1864	571
James S. Chambers, navy agent.....	1864	572
Amos Binney.....	1826	573
John Thomas.....	1841	573
Samuel F. Marks.....	1860	581
Isaac V. Fowler.....	1860	581
Mitchell Steever.....	1861	581

I think the honorable senators must give their assent to the propositions I have made that in regard to cabinet officers it is almost impossible to expect removal as a separate act; that political removals necessarily have for their first step the selection and presentation of the new man for whose enjoyment of office the removal is to take place; that in regard to criminality and necessity requiring instant removal of subordinate officers, resignation will then be required by their sureties or by their sense of shame or their disposition to give the easiest issue to the difficulty in which they are placed; and when with the circumstances of the

matter reducing the dimensions of the possibility and the frequency within these narrow limits I present to you on behalf of the respondent these evidences of the action of this government during the session of the Senate, I think you must be satisfied with the proposition assented to by every statesman—I think assented to by every debater on the passage of this civil-tenure act: that the doctrine and the action and the practice of the government had been that the President removed in session or in recess, though some discrimination of that kind was attempted; but the facts, the arguments, the reasons all show that removal, if a right and if a power, is not discriminated between session and recess.

Look at it in regard to this point: the Senate is in session, and a public officer is carrying on his frauds at San Francisco or at New York, or wheresoever else, perhaps in Hong Kong or Liverpool, and it comes to the knowledge of the Executive; the session of the Senate goes on; the fact of his knowledge does not put him in possession of a good man to succeed him either in his own approval or in the assent of the new nominee; and if it is necessary under our Constitution that the consul at Hong Kong or at Liverpool, or the sub-treasurer at New York, or the master of the mint at San Francisco, should go on with his frauds until you and the President can find a man and send him there and get his assent and his qualifications, very well. It is not a kind of legislation that is adapted to the circumstances of the case is all that I shall venture to suggest. Whatever your positive legislation has done or attempted to do, no construction and no practice of the government while the executive department was untrammelled by this positive restriction has ever shown a discrimination between session and recess. Of course, the difference between session and recess is shown in the political appointments where, the object being the new appointment, the commission goes out in the recess; where, during the session, the object being the new appointment, it must proceed through the concurrence of the Senate.

And now that I come to consider the actual merits of the proceeding of the President and give a precise construction to the first section of the bill, I need to ask your attention to a remarkable concession made by Mr. Manager Butler in his opening, as we regarded it, that if the President, having this wish of removal, had accomplished it in a method the precise terms of which the honorable manager was so good as to furnish, then there would have been no occasion to have impeached him. It is not then, after all, the *fortiter in re* on the part of the President that is complained of, but the absence of the *suaviter in modo*; and you, as a court, upon the honorable manager's own argument, are reduced to the necessity of removing the President of the United States not for the act, but for the form and style in which it was done, just as the collector at Mobile was removed for saying that the river Tombigbee did not run up at all.

But more definitely the honorable manager [Mr. Boutwell] has laid down two firm and strong propositions—I will ask your attention to them—bearing on the very merits of this case. We argue that if this act be unconstitutional we had a right to obey the Constitution, at least in the intent and purpose of a peaceful submission of the matter to a court, and that our judgment on the matter, if deliberate, honest, and supported by diligent application to the proper sources of guidance, is entitled to support us against an incrimination. To meet that, and to protect the case against the injury from the exclusion of evidence that tends to that effect, the honorable manager [Mr. Boutwell] does not hesitate to say that the question of the constitutionality or unconstitutionality of the law does not make the least difference in the world where the point is that an unconstitutional law has been violated, and for a President to violate an unconstitutional law is worthy of removal from office. Now, mark the desperate result to which the reasoning of the honorable managers, under the pressure of our argument,

has reduced them. That is their proposition, and the reason for that proposition is given in terms. If that is not so; if the question of constitutionality or unconstitutionality in fact is permitted to come into your considerations of crime, then you would be punishing the President for an error of judgment, or releasing him or condemning him according as he happened to have decided right or wrong, and that the honorable manager tells us is contrary to the first principles of justice. Let us, before we get through with this matter, have some definite meeting of minds on this subject between these honorable managers and ourselves.

At page 814, in the argument of the honorable manager [Mr. Boutwell], we are told that "the crime of the President is not, either in fact or as set forth in the articles of impeachment, that he has violated a constitutional law; but his crime is that he has violated a law, and in his defence no inquiry can be made whether the law is constitutional," and that the Senate in determining innocence or guilt is to render no judgment as to the constitutionality of the act. I quote the results of his propositions, not the full language. At page 815, this is the idea:

If the President may inquire whether the laws are constitutional, and execute those only which he believes to be so, then the government is the government of one man. If the Senate may inquire and decide whether the law is in fact constitutional, and convict the President if he has violated an act believed to be constitutional, and acquit him if the Senate think the law unconstitutional, then the President is, in fact, tried for his judgment, to be acquitted if, in the opinion of the Senate, it was correct judgment, and convicted if, in the opinion of the Senate, his judgment was erroneous. This doctrine offends every principle of justice.

That doctrine does with us offend every principle of justice, that a President of the United States should be convicted when honestly, with proper advice, peacefully and deliberately, he has sought to raise a question between the

Constitution and the law; and the honorable manager can escape from our argument on that point in no other mode than by the desperate recourse of saying that constitutional laws and unconstitutional laws are all alike in this country of a written Constitution, and that anybody who violates an unconstitutional law meets with some kind of punishment or other. This confusion of ideas as to a law being valid for any purpose that is unconstitutional I have already sufficiently exposed in a general argument. At page 815 he says:

It is not the right of any senator in this trial to be governed by any opinion he may entertain of the constitutionality of the law in question.

You may all of you think the law is unconstitutional, and yet you have got to remove the President! "It has not been annulled by the Supreme Court." And you may simply inquire whether he has violated the law.

That is pretty hard on us that we cannot even go to the Supreme Court to find out whether it is unconstitutional, and we cannot regard it on our own oath of office as unconstitutional and proceed to maintain the obligation to sustain the Constitution, and you cannot look into the matter at all, but the unconstitutional law must be upheld!

Nor can the President prove or plead the motive by which he professes to have been governed in his violation of the laws of the country.

What is the reason for that? He has taken an oath to preserve the Constitution, and therefore he cannot say that he acted under the Constitution and not under the law. His oath strikes him so that he cannot maintain the Constitution, and the Constitution cannot protect him.

A man who breaks an unconstitutional law on the ground that it is unconstitutional and that he has a right to break it, is "a defiant usurper."

Those are the propositions, and I think the honorable manager is logical; but the difficulty is, that his logic drives him to an absurdity which, instead of rejecting, he adopts—a fault in reasoning which certainly we should not expect.

On the question of construction of the law, what are the views of the honorable managers as to the point of guilt or innocence? We have claimed that if the President in good faith construed this law as not including Mr. Stanton under its protection, and he went on upon that opinion, he cannot be found guilty. The honorable manager [Mr. Boutwell], at page 839, takes up this question and disposes of it in this very peculiar manner:

If a law—

I ask your attention to this:

If a law passed by Congress be equivocal or ambiguous in its terms, the Executive, being called upon to administer it, may apply his own best judgment to the difficulties before him, or he may seek counsel of his advisers or other persons; and, acting thereupon without evil intent or purpose, he would be fully justified—

We never contended for anything stronger than that—

he would be fully justified, and upon no principle of right could he be held to answer as for a misdemeanor in office.

Logic is a good thing, an excellent thing; it operates upon the mind without altogether yielding to the bias of feeling; and as we press an argument, however narrow it may be, if it be logical, the honorable managers seem obliged to bend to it, and in both cases have thrown away their accusation. Tell me, what more do we need than this, an ambiguous and equivocal law which the President was called on to act under, and might, as we tried to prove, “seek counsel from his official advisers or other proper persons, and acting thereupon without evil intent or purpose he would be fully justi-

fied, and upon no principle of right could he be held to answer as for a misdemeanor in office?" And what is the answer which the honorable managers make to this logical proposition? Why, that this act is not of that sort; it is as plain as the nose on a man's face, and it was nothing but violent resistance of light that led anybody outside of this Senate to doubt what it meant! The honorable manager who follows me [Mr. Bingham] will have an opportunity to correct me in my statements of their propositions, and to furnish an adequate answer, I doubt not, to the views I have had the honor now to present.

And now take the act itself, which is found at page 430 of the edition of the statutes I have before me. It is provided—

That every person holding any civil office, to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided.

Then the "provision otherwise" is:

*Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

That is the operative section of this act of erecting and limiting the new arrangement of offices. The section of incrimination, so far as it relates to removal, I will read, omitting all that relates to any other matter; the sixth section:

That every removal . . . contrary to the provisions of this act . . . shall be deemed, and is hereby declared to be, a high misdemeanor—

I alter the plural to singular—

And upon trial and conviction thereof, every person guilty thereof shall be punished by a fine not exceeding \$10,000, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court.

You will observe that this act does not affix a penalty to anything but a "removal," an accomplished removal. Acts of a penal nature are to be construed strictly; and yet whenever we ask that necessary protection of the liberty and of the property and of the life of a citizen of the United States under a penal statute, we are told that we are doing something extraordinary for a lawyer in behalf of his client. All principles, it seems, are to be changed when you have a President for a defendant; all the law retires, and will and object and politics assume their complete predominance and sway, and everything of law, of evidence, and of justice is narrow and not enlarged. That may be. All I can say is that if the President had been indicted under this act, or should hereafter be indicted under this act, then the law of the land would apply to his case as usually administered, and if he has not removed Mr. Stanton he cannot be punished for having done it. You might have punished an attempt to remove. See what you have done in regard to appointments:

Every appointment or employment made, had, or exercised contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for, or in respect to any such appointment or employment, shall be deemed, and is hereby declared to be, a high misdemeanor.

There you have made not only an appointment, but an attempt on movement of the pen toward an appointment a crime, and you will punish it, I suppose, some day or other. But removal stands on act and fact. Now, what does the article charge in this behalf? for I believe as yet it has not



been claimed that it is too narrow to insist that the crime as charged in the article shall be the one you are to try. "Removal" is not charged in the articles anywhere; the allegation is that Andrew Johnson did unlawfully and in violation of the Constitution "issue an order in writing for the removal of Edwin M. Stanton, with intent to violate" the civil-tenure act, and "with intent to remove him, the Senate being in session." If you had had a section of this statute that said "any removal, or the signing of any letter, or order, or paper, or mandate of removal, shall be a crime," then you would have had an indictment and a crime before you; but you have neither crime nor indictment, as appears from this first article. And yet it may be said that in so small a matter as the question of the removal of a President it does not do to insist upon the usual rules of construction of a criminal law. I understand the proposition to be this: that here is a criminal law which has been violated; that by the law of the land it has been violated, so that indictment could inculcate, verdict would find guilt, and sentence would follow at law; and that thereupon, upon that predicament of guiltiness, the President of the United States is exposed to this peculiar process of impeachment; and if I show that your law does not make punishable an attempt to remove, or a letter of removal, and that your article does not charge a removal, and that is good at law, then it is good against impeachment, or else you must come back to the proposition that you do not need a legal crime.

So much for the law. What is the true attitude of Mr. Stanton and of the President of the United States towards this office and this officer at the time of the alleged infraction of the law? Mr. Stanton held a perfectly good title to that office by the commission of a President of the United States to hold it, according to the terms of the commission, "during the pleasure of the President for the time being." That is the language of the commission. He held a good title to the

office. A *quo warranto* moved against him while he held that commission unrevoked, unannulled, and undetermined would have been answered by the production of the commission. "I hold this office during the pleasure of the President of the United States for the time being, and I have not been removed by the President of the United States." That was the only title he held up to the passage of the civil-tenure act. By the passage of the civil-tenure act it is said that a statutory title was vested in him not proceeding from the executive power of the United States at all, not commissioned by the Executive of the United States at all, not to be found, ascertained, or delegated by the Executive of the United States at all, but a statutory title superadded to his title from the executive authority which he held during pleasure, which gave him a durable office determinable only one month after the expiration of some term of years or other.

We are not now discussing the question whether he is within it or not. That being so, the first question to which I ask your attention is this, that the act is wholly unconstitutional and inoperative in conferring upon Mr. Stanton or anybody else a durable office to which he has never been appointed. Appointment to all office proceeds from the President of the United States, or such heads of department or such courts of law as your legislation may repose it in. You cannot administer appointment to office yourselves, for what the Constitution requires the President to have control of you cannot confer anywhere else. The appointment of Secretary of War is one which cannot be taken from the President and conferred upon the courts of law or the heads of department. Whatever may be the action of Congress limiting or contriving the office, as you please, the office itself is conferable only by the action of the Executive. And when Mr. Stanton holds or anybody else holds an office during pleasure, which he has received by commission and authority

of the President of the United States, a sufficient title to, you can no more confer upon him by your authority and appointment a title durable and *in invitum* as against the President of the United States, you can no more confer it upon him because he happens to be holding an office during pleasure than you could if he was out of office altogether. I challenge contradiction from the lawyers who oppose us and from the judgment of honorable and intelligent lawyers here. Where are you going to carry this doctrine of legislative appointment to office if you can carry it to find a man whom the President has never asked to hold an office except from day to day and can enact him into a durable office for life? You may determine tenures if you please; I am not now discussing that; you may determine tenures for life; but you cannot enact people into tenures for life. The President must appoint; and his discretion and his judgment in appointing to an office for life are very different from his discretion and his appointing to an office during his pleasure, which he can change at will. Now you will sweep all the offices of the country not only into the Senate but into Congress if you adopt this principle of enacting people into office; and if, upon the peg that there is an office at sufferance or at will, you can convert it in favor of the holder by an act of Congress into an estate for life or for years, you will appoint to office; and of that there can be no doubt.

The next question, and the only question, of constitutionality or construction (for the general question of the constitutional power to restrict appointments I shall not further trouble the Senate with) is, whether the Secretary of War is within the first section. The office of the Secretary of War is within the first section undoubtedly. The question, therefore, is whether the provisions concerning the office of Secretary of War applicable to that office are in their terms, giving them full force and effect, such as to hold Mr. Stanton in that office against the will of the President by

the statutory term that is applicable to that office, and is or is not applied to him.

The argument that if Mr. Stanton is not within the proviso then he is within the body of the section stumbles over this transparent and very obvious, as we suppose, fallacy; the question of the law is whether the office of Secretary of War is within the proviso or not. You have not made a law about Mr. Stanton by name. The question, then, whether he is within one or the other terms of the alternative, is whether the office of Secretary of War is within the section or within the proviso; and will anybody doubt about that? It is on the same footing with the other secretaryships; it is on the same footing as an office with every other department. The question whether the office of Mr. Stanton or the office of Mr. Browning is within one or the other alternative of the section is not a question of construction of law, but a question of whether the facts of the tenure and holding of the actual incumbency of the one or the other bring him within the proviso. If he is not brought within the proviso, his office being there, the fact that he is not in does not carry his office back into the first part, because his office would be back there for the future as well as for the past and for the present.

It is a statute made for permanent endurance, and the office of Secretary of War, now and forever, as long as the statute remains upon the book, is disposed of one way or the other within the first part or within the proviso. And yet we have been entertained, in public discussions as well as in arguments here, with what is supposed to be a sort of triumphant refutation, that Mr. Stanton's office in his actual incumbency is not protected by the proviso; that then his office is carried back under the body of the section. There is no doubt about the office being under the proviso. It says so:

*Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively, etc.

That does not mean the men; it means the offices shall have that tenure. Having got along so far that this office of Secretary of War, like the office of Secretary of the Interior, must always remain under that proviso, and is never governable or to be governed by the body of the section, we have but one other consideration, and that is whether the proviso, which is the only part of the section that can operate upon the office of Secretary of War, so operates upon that office as to cover Mr. Stanton in a durable tenure for the future; and that turns upon the question whether the durability of tenure provided as a general rule for the office is in the terms of its limitation such as to carry him forward, or whether its bound has already been reached and he is out of it. That is the question of fact in the construction of the proviso. He either stays in the proviso or he drops out of the proviso; and if he personally drops out of the proviso in his present incumbency he cannot get back into the operative clause, because he cannot get back there without carrying his office there, and his office never can get back.

Is it not true that this proviso provides a different tenure for the cabinet officers from what the first and operative part of the section provides? If this office or this officer goes back, this very incumbent goes back; he gets a tenure that will last forever, that is, until the Senate consents to his removal. How absurd a result that is, to give to this poor President control of his cabinet, that those he appointed himself, if he should happen to be re-elected, he could get rid of in a month, and those that Mr. Lincoln appointed for him from the beginning, and before he had any choice in it, he must hold on to forever, till you consent that they shall go out; that those in regard to whom he had the choice of nomination he may by the expiration of the statutory term be freed from,

but those that he had nothing to do with the appointment of shall last forever, till you consent to release him specifically from them. That is the necessary result of carrying him personally back, and Mr. Stanton would hold under the next President—if any of you can name him, I will supply in the argument his name—I can name several; whether it is the President that is to come in by removal from office, or the President by the election of the people in the autumn. Either way he would have a choice to relieve himself from the Secretaries. No; I think they would all then be in a shape for him, all having been appointed by somebody that had preceded him, and he would not have any chance at all.

Such absurdity, either in reasoning or practical result, can never be countenanced by the judgment of this court. If the office of the Secretary of War is within the proviso, and it certainly is, as it is not contended that the other Secretaries are not in their offices within it, then Mr. Stanton is or is not protected by the proviso. If he is not protected by the proviso his case is not provided for. Now, suppose this proviso had contained a second proviso following after the first, “and provided further, that the persons now holding the offices of Secretary of War, etc., who were appointed and commissioned by Mr. Lincoln, shall not be deemed within the above proviso, which regulates the tenure of those offices,” that would not have carried the offices back under the new tenure of the operative section, but simply have provided that, the offices being governed by the proviso, the incumbents, under the particular circumstances of their case, should not be even protected by the proviso; and this is the necessary construction of the act.

If this be the real construction, there is the end of the crime. If the construction be equivocal or ambiguous, the honorable manager [Mr. Boutwell] says it would be abhorrent to every sense of justice to punish the President for having erred in its construction; but being so plain a case

that nobody can say two words on the one side or the other of it, it is mere assumption to say that there is a doubt or difficulty, and that an argument is necessary. Well, we certainly have belied on the one side and the other the proposition of this absolute plainness, for we have spent a great many words on this subject on the one side and the other. This being so, let us consider what the President did; and assuming that the statute covers Mr. Stanton's case, assuming that the removal of Mr. Stanton is prohibited by it under the penalties, let us see what the President did.

I have said to you that Mr. Stanton had a title to this office dependent on the President's pleasure. He claimed, or others claimed for him, that he had a tenure dependent on the statute. The question of dependence on the statute was a question to be mooted and determined as a novel one; the question of tenure by appointment was indubitable; and the President proposed to put himself in the attitude of reducing the tenure of Mr. Stanton to his statutory tenure at least. He therefore issues a paper which is a revocation of his commission, a recall of his office, as it depends on presidential appointment. Without that no question ever could be raised by any person upon the statutory tenure, because the presidential tenure would be an adequate answer to a *quo warranto*. The President then, peaceably and in writing, issued a paper which is served upon Mr. Stanton, saying, in effect, "I, the President of the United States, by such authority as I possess, relieve or remove you from the office of Secretary of War"; and that that recalled and terminated the commission and the title that was derived from presidential appointment nobody can deny.

Did the President proceed further? When Mr. Stanton, as he might reasonably have expected; when, as upon the evidence he did probably calculate, instead of adhering to his opinion that the tenure-of-office act was unconstitutional and that the tenure-of-office act did not include his

title, refused to yield the only title that on Mr. Stanton's profession he held, to wit, the presidential appointment, to this recall, did the President then interpose force to terminate his statutory title, or did he, having thus reduced him to the condition of his statutory title then propose and then act either in submission to the power which Mr. Stanton had over him, or did he wish to have the question of the statutory title determined at law? It is enough to say that he did not do anything in the way of force; that he expected in advance, as appears by his statements to General Sherman, that Mr. Stanton would yield the office. Why should Mr. Stanton not yield it? The grounds on which he had put himself in August were that his duty required him to hold the office until Congress met; that is to hold it so that the presidential appointment could not take effect without your concurrence. Congress had met and was in session, and this "public duty" of Mr. Stanton, on his own statement had expired. Mr. Stanton had told him that the act was unconstitutional and had aided in writing the message that so disclosed the presidential opinion to you.

He had concurred in the opinion that he was not within the act. His retirement on this order would be in submission to these views, if not in submission to the views Senators here had expressed that no man could be imagined who would refuse to give up office in the cabinet when desired by the President; but if that predicament was excusable while this Senate was not in session to prevent a bad appointment, if that was feared, how could it be a reason when this Senate was in session? Mr. Stanton having stated to General Thomas on the first presentation of his credential that he wanted to know whether he desired him to vacate at once, or would give him time to remove his private papers, and that having been reported to the President, the President regarded it as all settled, and so informed his cabinet, as you have permitted to be given in evidence. After that, after



the 21st, what act is charged in this article? Up to and through the 21st and the written order of removal and its delivery to Mr. Stanton, and the repose of the President upon that posture in which Mr. Stanton left it, what was done by the President about that office? Nothing whatever. There was a desire, an effort to seize upon a movement made by Mr. Stanton, based upon an affidavit, not that he had removed from office, but sworn to on the 21st, and again on the early morning of the 22d, that he was still in the office and held it against General Thomas, and instantly the President said, "Very well, the matter is in Court."

It might have gone into Court on the trial of an indictment against Thomas; but a speedier method was arrived at in the consultations of the President with his counsel, to have a *habeas corpus* carried forward before the Supreme Court, and jump at that. Then Mr. Chief Justice Carter, who, I take it, all who know him understand to be one who sees as far into a millstone as most people, put that cause out of his Court by its own weight and the *habeas corpus* fell with it. That is all that is proved and all that is done. I submit to you, therefore, that the case of a resistance or violation of law does not at all arise. We do not even get to the position of whether a formal and peaceable violation, for the purpose of raising the question before the Supreme Court, was allowable. A revocation of the presidential title of Stanton was allowable; a resistance of the statutory title was not attempted; and the matter stood precisely as it would stand if a person was in the habit of cutting wood on your lot, and claimed a title to it, and meant to have a right to cut wood there, and before you went to law with him to determine the right in an action of trespass you were careful to withdraw a license terminable at will which you had given him and under which he was cutting wood. Withdraw your license before you bring your action of trespass or you will be beaten in it. Withdraw your license, and then he cuts upon his claim of

right, and your action of trespass has its course and determines title. That was the situation.

All that is said about the right to violate unconstitutional laws never can have the footing for consideration, where all that is done by anybody is to put upon paper the case out of which, as an instance, the judgment of a Court can be called for as to a violation or no violation. If there must be an intervention of force, then a law may be said to be violated and an offender must suffer, accordingly as it shall prove to be constitutional or unconstitutional. But where there is a Constitution as the predominant law, the statute as an inferior law, and an executive mandate is issued by the President in pursuance of either one law or the other, according to which is in force, for they both cannot be, we suppose, then he commits no violation of the law in thus presenting for consideration and determination the case.

We must, then, come either to intent, purpose, motive, some force prepared, meditated, threatened, or applied, or some evil invasion of the actual working of the department of the Government in order to give substance to this allegation of fault. No such fact, no such intent, no such purpose is shown. We are prevented from showing the attendant views, information, and purpose upon which the President proceeded; and if so, it must be upon the ground that views, intent, and purpose do not qualify the act. Very well, then, carry it through so; let the managers be held to the narrowness of their charges when they ask for judgment as they are when they exclude testimony, and let it be determined upon their reasoning on an article framed upon this plan, "that the President of the United States, well knowing the act to be unconstitutional, as in fact it is, undertook to make an appointment contrary to its provisions and conformable to the Constitution of the United States, with the intent that the Constitution of the United States should prevail in regard to the office in overthrow of the authority of the act of Con-

gress, and thereupon and thereby, with an intent against which there can be no presumption, for he is presumed to have intended to do what he did do, we ask that for that purpose of obeying the Constitution rather than an invalid law he should be removed from office!"

And this absurdity is no greater than—for it is but a statement of—the propositions of law and of fact to which the honorable managers have reduced themselves in their theories of this cause, which exclude all evidence of intent or purpose and of effect and conduct, and take hold upon mere personal infraction of a statute of the United States, granting, for the purpose of argument, that it may be unconstitutional, and insisting that, under your judgments, it shall not make any difference whether it is unconstitutional or not. If that be so, then we have a right to claim that it is unconstitutional for the purposes of your judgment; and they agree that if you cannot so treat it and find us guilty, then it would be against the first principles of justice to punish us for an erroneous or mistaken opinion concerning constitutionality

Now, the review of the evidence I do not purpose to weary you with. It all lies within the grasp of a handful on either side, and it will astonish you, if you have not already perused the record, how much of it depends upon the arguments or the debates of counsel, how little upon what is included in the testimony. Already your attention has been turned to the simplicity and folly, perhaps, of the conduct of General Thomas; already your attention must have fixed itself upon the fact that to prove this threatened *coup d'état* to overthrow the Government of the United States and control the Treasury and the War Department you had to go to Delaware to prove a statement by Mr. Karsner that twenty days afterward Thomas said he would kick Stanton out. That is the fact; there is no getting over it. A *coup d'état* in Washington on the 21st of February, meditated, prepared, planned by military force, is proved by Karsner, brought from Delaware

to say that on the 9th of March, in the east room, General Thomas said he meant to kick Stanton out. That phrase, disrespectful as it is, and undoubtedly intimating force, is rather of a personal than of a national act. I submit that criticism is well founded. I think so. It comes up to a breach of the peace, provided it has been perpetrated. But it does not come up to that kind of proceeding by which Louis Napoleon seized the liberties of the French republic; and we expected, under the heats under which this impeachment was found, that we should find something of that kind. The managers do not neglect little pieces of evidence, as is shown by their production of Mr. Karsner; and if they find this needle in a haystack and produce it as the sharp point of their case, there is nothing else, there is no bristling of bayonets under the hay-mow, you may be sure. Are there, then, any limits or discriminations in transactions of state? Are there public prosecutions, public dangers, public force, public menace? Undoubtedly there might be, and undoubtedly many who voted for impeachment supposed there were; and undoubtedly the people of the United States, when they heard there had been an impeachment voted, took it for granted there was something to appear. We have gone through it all. There is no defect of power nor of will. Every channel of the public information, even the newspapers, seem to be ardent and eager enough to aid this prosecution. Everybody in this country, all the people of the United States, are interested. They love their liberties; they love their Government; and if anybody knew of anything that would bear on that question of force, the *coup d'état*, we should have heard it. We must, then, submit, with great respect, that upon this evidence and upon these allegations there is no case made out of evil purpose, of large design of any kind, and no act that in form is an infraction of any law.

Now, what is the attitude which you must occupy toward

each particular charge in these articles? Guilty or not guilty of a high crime and misdemeanor by reason of charges made and proved in that article; guilty of what the Constitution means as sufficient cause for removal of a President from office within that article. You are not to reach over from one article to another; you are to say guilty or not guilty of each as it comes along; and you are to take the first one as it appears; you are to treat it as within the premises charged and proved; you are to treat the President of the United States, for the purpose of that determination, as if he were innocent of everything else, of good politics and good conduct; you are to deal with him under your oath to administer impartial justice within the premises of accusation and proof as if President Lincoln were charged with the same thing, or General Grant, if the proposition that political gratitude is a lively sense of benefits expected leads men's minds forward rather than backward in the list of Presidents; you are to treat it as if the respondent were innocent, as if he were your friend, as if you agreed in public sentiment, in public policy; and nevertheless the crime charged and proved is such as that you will remove General Washington or President Lincoln for the same offence.

I am not to be told that it was competent for the managers to prove that there were *coup d'états*, hidden purposes of evil to the State, threatened in this innocent and formal act apparently. Let them prove it, and then let us disprove it, and then judge us within the compass of the testimony and according to the law governing these considerations. But I ask you if I do not put it to you truly that within the premises of a charge and proof the same judgment must go against President Lincoln with his good politics, and General Washington with his majestic character, as against the respondent?

And so, as you go along from the first to the second article will you remove him for having made an error about the repeal or non-repeal of statutes in regard to appointments

to office, if you can find a fault? I cannot see any fault under any of the forms of the statutes. If the power of removal of Mr. Stanton under the former practice of the Government and unrestricted by this civil-tenure act existed, it existed during the session as well as during the recess. If that were debatable and disputable the prevailing opinion was that it covered, and the practice of the Government shows that it covered, the removal during the session. At any rate, you must judge of this as you would have judged of Mr. Lincoln, if he had been charged with a high crime in appointing Mr. Skinner to be Postmaster General when there was not any authority under the appointment acts of the United States.

And this brings me very properly to consider, as I shall very briefly, in what attitude the President stands before you when the discussion of vicious politics or of repugnant politics, whichever may be right or wrong, is removed from the case. I do not hesitate to say that if you separate your feelings and your conduct, his feelings and his conduct, from the aggravations of politics as they have been bred since his elevation to the Presidency, under the peculiar circumstances which placed him there, and your views in their severity, governed, undoubtedly, by the grave juncture of the affairs of the country, are reduced to the ordinary standard and style of estimate that should prevail between the departments of this Government, I do not hesitate to say that upon the impeachment investigations and upon the impeachment evidence you leave the general standing of the President unimpaired in his conduct and character as a man or as a magistrate. Agree that his policy has thwarted and opposed your policy, and agree that yours is the rightful policy; nevertheless, within the Constitution and within his right, and within his principles as belonging to him and known and understood when he was elevated to the office, I apprehend that no reasonable man can find it in his heart to say that evil has been proved against him here. And how much is

there in his conduct toward and for his country that up to this period of division commends itself not only to your approval but to the approval and applause of all his countrymen? I do not insist upon this topic, but I ask you to agree with me in this: that his personal traits of character and the circumstances of his career have made him in opinion what he is, without learning, as it is said by his biographers, never having enjoyed a day's schooling in his life, devoted always to such energetic pursuits in the service of the State as commended him to the favor of his fellow-citizens and raised him step by step through all the gradations of the public service, and in every trial of fidelity to his origin and to the common interests proved faithful, struggling always in his public life against the aristocratic influences and oppressions which domineered so much in the section of country from which he came. He was always faithful to the common interest of the common people, and carried by his aid and efforts as much as any one else the popular measure of the homestead act against the southern policy and the aristocratic purposes of the governing interests of the south.

And I ask you to notice that, bred in a school of Tennessee democratic politics, he had always learned to believe that the Constitution must and should be preserved; and I ask you to recognize that when it was in peril, and all men south of a certain line took up arms against it, and all men north ought to have taken up arms in politics or in war for it, he loved the country and the Constitution more than he loved his section and the glories that were promised by the evil spirits of the rebellion. I ask you whether he was not as firm in his devotion to the Constitution when he said, in December, 1860.

Then let us stand by the Constitution; and, in saving the Union, we save this, the greatest Government on earth.

And whether, after the battle of Bull Run, he did not show as great an adhesion to the Constitution when he said:

The Constitution—which is based on principles immutable, and upon which rest the rights of men and the hopes and expectations of those who love freedom throughout the civilized world—must be maintained.

He is no rhetorician and no theorist, no sophist and no philosopher. The Constitution is to him the only political book that he reads. The Constitution is to him the only great authority which he obeys. His mind may not expand; his views may not be so plastic as those of many of his countrymen; he may not think we have outlived the Constitution, and he may not be able to embrace the Declaration of Independence as superior and predominant to it. But to the Constitution he adheres. For it and under it he has served the State from boyhood up—labored for, loved it. For it he has stood in arms against the frowns of a Senate; for it he has stood in arms against the rebellious forces of the enemy; and to it he has bowed three times a day with a more than eastern devotion.

And when I have heard drawn from the past cases of impeachment and attempts at deposition, and five hundred years have been spoken of as furnishing the precedents explored by the honorable managers, I have thought they found no case where one was impeached for obeying a higher duty rather than a written law regarded as repugnant to it, and yet, familiar to every child in this country, as well as to every scholar, a precedent much older comes much nearer to this expected entanglement. When the princes came to King Darius and asked that a law should be made that "whosoever shall ask any petition for thirty days, save of thee, O king, he shall be cast into the den of lions"; and when the plea was made that "the law of the Medes and Persians altereth not," and the minister of that day, the great head and manager of the affairs of the empire, was found still to maintain his devotion to the superior law, which made an infraction of the lower law, then was the case when the



question was whether the power to which he had been obedient was adequate to his protection against the power that he had disobeyed; and now the question is whether the Constitution is adequate to the protection of the President for his obedience to it against a law that the princes have ordained that seeks to assert itself against it. The result of that impeachment we all know, and the protection of the higher power was not withheld from the obedient servant.

The honorable Manager, Mr. Wilson, in the very interesting and valuable report of the minority of the Judiciary Committee, entertains and warns the House of the fate of impeachment as turning always upon those who were ready with its axe and sword to destroy. He gives, in the language of Lord Caernarvon on Lord Danby's trial, a history of the whole force of them, and everybody is turned against in his turn that draws this sword. In this older case that I have referred to you may remember in the brief narrative that we have a history of the sequel of the impeachers:

And they brought those men which had accused Daniel, and they cast them into the den of lions, them, their children, and their wives; and the lions had the mastery of them, and brake all their bones in pieces or ever they came at the bottom of the den.

This, then, Senators, is an issue not of political but of personal guilt, within the limits of the charge and within the limits of the proof. Whoever decides it must so decide, and must decide upon that responsibility which belongs to an infliction of actual and real punishment upon the respondent. We all hold one the other in trust; and when the natural life is taken He who framed it demands "Where is thy brother?" And when under our frame of Government, whereby the creation of all departments proceeds from the people, which breathes into these departments, executive and judicial, the breath of life; whose favor is yours as well as the President's, continuing force and strength, asks of you, as your sentence is promulgated, "Where is thy brother in this government

whom we created and maintained alive?" no answer can be given that will satisfy them or will satisfy you, unless it be in truth and in fact that for his guilt he was slain by the sword of the Constitution upon the altar of Justice. If that be the answer you are acquit; he is condemned; and the Constitution has triumphed, for he has disobeyed and not obeyed it, and you have obeyed and not disobeyed it.

Power does not always sway and swing from the same centre. I have seen great changes and great evils come from this matter of unconstitutional laws not attended to as unconstitutional, but asserted, and prevailing, too, against the Constitution, till at last the power of the Constitution took other form than that of peaceful, judicial determination and execution. I will put some instances of the wickedness of disobeying unconstitutional laws and of the triumph of those who maintained it to be right and proper.

I knew a case where the State of Georgia undertook to make it penal for a Christian missionary to preach the gospel to the Indians, and I knew by whose advice the missionary determined that he would preach the gospel and not obey the law of Georgia, on the assurance that the Constitution of the United States would bear him out in it; and the missionary, as gentle as a woman, but as firm as every free citizen of the United States ought to be, kept on teaching to the Cherokees.

And I knew the great leader of the moral and religious sentiment of the United States, who, representing in this body, and by the same name and of the blood of one of its distinguished Senators now [Mr. Frelinghuysen], the State of New Jersey, tried hard to save his country from the degradation of the oppression of the Indians at the instance of the haughty planters of Georgia. The Supreme Court of the United States held the law unconstitutional and issued its mandate, and the State of Georgia laughed at it and kept the missionary in prison, and Chief Justice Marshall and

Judge Story and their colleagues hung their heads at the want of power in the Constitution to maintain the departments of it. But the war came, and as from the clouds from Lookout Mountain swooping down upon Missionary Ridge came the thunders of the violated Constitution of the United States and the lightnings of its power, over the still home of the missionary Worcester, and the grave of the missionary Worcester, taught the State of Georgia what comes of violating the Constitution of the United States.

I have seen an honored citizen of the State of Massachusetts, in behalf of its colored seamen, seek to make a case by visiting South Carolina to extend over those poor and feeble people the protection of the Constitution of the United States. I have seen him attended by a daughter and grandchild of a signer of the Declaration of Independence and a framer of the Constitution, who might be supposed to have a right to its protection, driven by the power of Charleston and the power of South Carolina, and the mob and the gentlemen alike, out of that State and prevented from making a case to take to the Supreme Court to assert the protection of the Constitution. And I have lived to see the case thus made up determined that if the Massachusetts seamen, for the support of slavery, could not have a case made up, then slavery must cease; and I have lived to see a great captain of our armies, a General of the name and blood of Sherman, sweep his tempestuous war from the mountain to the sea, and returning home trample the State of South Carolina beneath the tread of his soldiery; and I have thought that the Constitution of the United States had some processes stronger than civil mandates that no resistance could meet. I do not think the people of Massachusetts suppose that efforts to set aside unconstitutional laws and to make cases for the Supreme Court of the United States are so wicked as is urged here by some of its representatives; and I believe that if we cannot be taught by the lessons we have learned

of obedience to the Constitution in peaceful methods of finding out its meaning, we shall yet need to receive some other instruction on the subject.

The strength of every system is in its weakest part. Alas for that rule! But when the weakest part breaks, the whole is broken. The chain lets slip the ship when the weak link breaks, and the ship founders. The body fails when the weak function is vitally attacked; and so with every structure, social and political, the weak point is the point of danger, and the weak point of the Constitution is now before you in the maintenance of the co-ordination of the departments of the Government, and if one cannot be kept from devouring another then the experiment of our ancestors will fail. They attempted to interpose justice. If that fails, what can endure?

We have come all at once to the great experiences and trials of a full-grown nation, all of which we thought we should escape. We never dreamed that an instructed and equal people, with freedom in every form, with a Government yielding to the touch of popular will so readily, ever would come to the trials of force against it. We never thought that what other systems from oppression had developed—civil war—would be our fate without oppression. We never thought that the remedy to get rid of a despotic ruler fixed by a Constitution against the will of the people would ever bring assassination into our political experience. We never thought that political differences under an elective Presidency would bring in array the departments of the Government against one another to anticipate by ten months the operation of the regular election. And yet we take them all, one after another, and we take them because we have grown to the full vigor of manhood, when the strong passions and interests that have destroyed other nations, composed of human nature like ourselves, have overthrown them. But we have met by the powers of the Constitution these great

dangers—prophesied when they would arise as likely to be our doom—the distractions of civil strife, the exhaustions of powerful war, the intervention of the regularity of power through the violence of assassination. We could summon from the people a million of men and inexhaustible treasure to help the Constitution in its time of need. Can we summon now resources enough of civil prudence and of restraint of passion to carry us through this trial, so that whatever result may follow, in whatever form, the people may feel that the Constitution has received no wound! To this Court, the last and best resort for this determination, it is to be left. And oh, if you could only carry yourselves back to the spirit and the purpose and the wisdom and the courage of the framers of the Government, how safe would it be in your hands! How safe is it now in your hands, for you who have entered into their labors will see to it that the structure of your work comports in durability and excellency with theirs. Indeed, so familiar has the course of the argument made us with the names of the men of the convention and of the first Congress that I could sometimes seem to think that the presence even of the Chief Justice was replaced by the serene majesty of Washington, and that from Massachusetts we had Adams and Ames, from Connecticut Sherman and Ellsworth, from New Jersey Paterson and Boudinot, and from New York Hamilton and Benson, and that they were to determine this case for us. Act, then, as if under this serene and majestic presence your deliberations were to be conducted to their close, and the Constitution was to come out from the watchful solicitude of these great guardians of it as if from their own judgment in this high court of impeachment.

## VI

### ARGUMENT IN THE UNITED STATES SUPREME COURT, ON BEHALF OF THE GOVERNMENT, IN *HEPBURN VS. GRISWOLD* (LEGAL TENDER CASE)

#### NOTE

By the legislation of Congress in 1862 the notes of the United States were made legal tender for the payment of private debts. The case of *Hepburn vs. Griswold* (Supreme Court Reports, 8 Wallace 603) brought squarely before the Supreme Court the question of the power of Congress under the Constitution to enact the measures in question and whether they were applicable to debts contracted prior to the enactment. This case was argued at the same time as the case of *Bronson vs. Rodes* (7 Wallace, 229). Both cases involved controversies between private litigants that turned upon the effect of the legal tender legislation. The cases were argued and re-argued, and upon the re-argument, December 9 and 10, 1868, Mr. Evarts, being then Attorney General of the United States, delivered the following argument on the public questions involved, to sustain in behalf of the Government the Constitutionality of the legal tender act, at the same time filing with the Court his brief in the cases. Mr. Clarkson N. Potter appeared as his opponent. When the legal tender question was brought before the Supreme Court, unusual public interest was aroused from the fact that Mr. Chase, who as Secretary of the Treasury had, during the Civil War, urged upon Congress the importance and necessity of this legislation to support the credit of the Government under the stress of the war, was now the Chief Justice of the Court that was to determine the Constitutional validity of its provisions. It was in these cases that the Chief Justice by his influence and vote in a divided court condemned as unconstitutional and void the very measures that his influence at the head of the finances of the Government had been largely instrumental in procuring from Congress. The case was

subsequently reversed in *Knox vs. Lee* (12 Wallace 457) and the legal tender legislation was upheld.

Mr. Evarts, in his eulogy on Chief Justice Chase, thus speaks of this incident in Mr. Chase's career:

"And now, when, after repeated argument at the bar, and long deliberations of the Court, the decision was announced, the determining opinion of the Chief Justice, in an equal division of the six associate justices, pronounced the legal tender acts unconstitutional, as not within the discretion of the political departments of Government, Congress, and the Executive, to determine this very question of the necessity of the juncture as justifying their enactment.

"The singularity of the situation struck everybody, and greatly divided public sentiment between applause and reproaches of the Chief Justice, as the principal figure both in the administrative measure and in its judicial condemnation. But soon, a new phase of the unsettled agitation on the merits of the constitutional question, drew public attention, and created even greater excitement of feeling and diversity of sentiment. The Court, which had been hostile to the appointing power of President Johnson, had been again opened by Congress to its permanent number, and its vacancies had been filled. A new case, involving the vexed question, was heard by the Court, and the validity of the disputed laws was sustained by its judgment. The signal spectacle of the Court, which had judged over Congress and the Secretary, now judging over itself, gave rise to much satire on one side and the other, and to some coarseness of contumely as to the motives and the means of these eventful mutations in matters, where stability and uniformity are, confessedly, of the highest value to the public interests, and to the dignity of Government.

"Confessing to a firm approval of the final disposition of the constitutional question by the Court, I concede it to be a subject of thorough regret that the just result was not reached by less uncertain steps. But, with this my adverse attitude to the Chief Justice's judicial position on the question, I find no difficulty in discarding all suggestions which would mix up political calculations with his judicial action. The error of the Chief Justice, if, under the last judgment of the Court, we may venture so to consider it,

was in following his strong sense of the supreme importance of restoring the integrity of the currency, and his impatience and despair at the feebleness of the political departments of the Government in that direction, to the point of concluding that the final wisdom of this great question,—*inter apices juris*, as well as of the highest reasons of state—was to deny to the brief exigency of war, what was so dangerous to the permanent necessities of peace. But a larger reason and a wider prudence, as it would seem, favor the prevailing judgment, which refused to cripple the permanent faculties of Government for the unforeseen duties of the future, and drew back the Court from the perilous edge of *law-making*, which, overpassed, must react to cripple, in turn, the essential judicial power. The past, thus, was not discredited, nor the future disabled.”

#### ARGUMENT

*If the Court please:* At the last term of this Court, in two cases which had been argued before it, and, doubtless, ably and thoroughly argued, to which the United States was not a party, and which were held under advisement by the Court, your Honors were pleased to direct a re-argument as between the parties, and also to extend a leave to the Attorney General to be heard on the part of the United States. This permissive invitation of the Court—

THE CHIEF JUSTICE: It is proper to be said that the Government asked to be heard. Your predecessor, Mr. Stanbery appeared in Court with a letter from the Secretary of the Treasury, asking that the Government might be heard through its Attorney General on these questions.

MR. EVARTS: I was proceeding, if your Honors please, to state as much. The re-argument, as I understand, was ordered by the Court, at least, that is the effect of the order. I am not advised of the motives of the Court in making the order.

This permissive invitation to the law officer of the Government to be heard in the causes was understood to be founded upon a representation that the public interests involved



were such as were regarded by the executive department as proper to be presented in behalf of the Government to the consideration of the Court.

Now, this permission to the Attorney General must be understood, of course, to extend only to the public question that is involved and upon unfolding the records of this controversy between these private parties, it is discovered that the public question, involved in the discussion of their rights, is the constitutionality and construction of a certain act of Congress—the act of February 25, 1862. The point in which that act comes to touch these private interests in controversy, and thus to be involved in the forensic discussion and the judicial decision of these private controversies, has to do with that portion of the act which imparts to a certain class of the public securities of the United States, in favor of the public creditor, the function or usefulness of service as money in the payment of private debts, at the will of the debtor. This faculty in favor of the public securities and the public credit, is imparted by that clause which provides that they shall be lawful money and a legal tender for all private debts within the United States.

In these private litigations to which I have referred, and in consequence of which the question is now to be discussed in the public interests, rights were alleged on the one side, and opposed on the other, which depended for their support upon the validity of this act of Congress. Now, in this discussion which I shall undertake, I shall not be unobservant of the posture of this question. It is not an original inquiry before your Honors, that is now being instituted. I enter a field in which the harvest has already been reaped by the sharp sickles of the lawyers, and has been bound into sheaves in the judgments of the subordinate courts. I am, therefore, not to treat it except so far as I may in aid of what light has already been shed upon the subject. Besides the confidence in the investigations of the bar which have preceded

me in this question, more than in almost any other, which is yet to be passed upon by the highest tribunal of the land, we have the most extensive, the most satisfactory, the most fruitful, the most elaborate judicial examinations, on the one side and on the other of this controversy, in the judgments of some of the ablest and most distinguished State Courts in the country. I think no one can hesitate to say that, in the judgments of the Court of the State of New York, of Pennsylvania, and of Kentucky, in each one there being divided and dissenting opinions, there has been, under the responsibility of judicial and impartial investigation and discussion, as thorough, as learned, and as faithful an examination of the topics that must be passed upon by this Court, as it lies in the resources of the intellect of man to furnish.

Now, that we may not argue too much on generalities, when the subject is so inviting to general discussions both of economy and of political power, and that we may understand precisely the action of this Government that is brought in question before this Court, thus invoking its highest function to be applied, in its reason and judgment, to correct the power of the country if it has erred, let us inquire what it is that this act of the political authority of the United States supported by an immense majority of the Representatives of the people in the lower House, passed by a vote of thirty to seven in the Senate, and approved by the Executive of the United States, has undertaken to do, and in what right or claim of the public interests and duty, it has sought to perform the office of good government, according to its terms, over the people of this country.

The act is entitled "An Act to authorize the Issue of United States Notes, and for the Redemption or Funding thereof, and for Funding the Floating Debt of the United States." It is, then, a measure, in its title and in its subject, of the largest connection and importance with regard to the

public credit, the public resources, the means, and agencies and powers of Government.

Its operative section only, as the main feature and incident in the enactment, present to the notice of the Court and of the nation this particular provision, which is supposed to militate against the guaranties of the Constitution, against the private rights of the citizen. It is a provision that there may be issued "on the credit of the United States, one hundred and fifty millions of dollars of United States notes, not bearing interest, payable to bearer at the Treasury of the United States" and of convenient denominations; and then this value, this service, this support to currency, is imparted to this form of the public debt: "such notes herein authorized shall be receivable in payment of all taxes, internal duties, excises, debts and demands of every kind due to the United States, except duties on imports."

The Government thus spreads them among the people as being, not only evidence of its debt to them, but as acceptable in discharge of their debts to it—"of all claims and demands against the United States, of every kind whatsoever, except for interest upon bonds and notes which shall be paid in coin." It professes to say to the subjects of the Government, "this form of our indebtedness to you shall be received by you in liquidation, or settlement and discharge, of all other forms of our indebtedness to you, except our debts in the shape of bonds and notes, which shall be payable in coin."

Then it is also provided that they shall be "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."—a tender for all debts which the Government owes the citizen, and all debts that the citizen owes the public, the Government.

In this financial arrangement proposed by the act is this further feature, by which as I shall submit to the Court,

the Government undertakes to deal on its part, with one side of the obligation, and with the citizens as a mass on the other. It is provided that as among the citizens these notes shall have the same virtue and faculty of liquidating debts among them. So that, finally, all the authority for the payment of debts shall end in securing to the parties the possession of this credit of the Government, issued in this form; and the Government professes, and, in fact, is held for, the payment finally, in the liquidation as between Government and the people, of these securities in coin.

But the scope and purpose of the financial arrangement does not end here; for it is provided that any holder of these notes to the amount of fifty dollars or any multiple of fifty, may present them to the Treasurer of the United States, and by an arrangement to facilitate the transaction, they are entitled to receive bonds of the United States with interest payable semi-annually at six per cent per annum, redeemable at certain dates. "Such United States notes shall be received the same as coin, at their par value, in payment for any loans that may be hereafter sold or negotiated by the Secretary of the Treasury, and may be re-issued from time to time as the exigencies of the public interests shall require."

As I understand it, of all that this act undertakes to accomplish in the financial obligations of the Government to the people and of the people to the Government, there is no feature of it, the constitutionality of which is brought in doubt, except the single and peculiar vigor, imparted to these securities, of service in the liquidation between debtor and creditor in private transactions, as money. All the judicial opinions, all the forensic disputations, agree that, although these notes do come distinctly up to the description defined by a phrase, in our early constitutional period, of "bills of credit," and although the Constitution contains no express authority to emit bills of credit, although this act purports, not only to give these notes currency in dis-

charge of all obligations to the Government, except duties on imports, but also compulsory power to liquidate, and to settle and discharge, in a certain sense, all obligations of the Government to the citizens; yet, all that is constitutional. It is within the authority of Congress, within the power of this Government, and the question of *appropriateness* or of *adaptation* or of wisdom, in these financial arrangements, up to this point, is not open to any judicial disputation upon any reason that can be found in the Constitution of the United States.

There, then, remains for consideration only this point, and it is much narrower than the discussion of whether the Government of the United States has plenary authority over the subject of legal tender in the United States, or plenary authority over the question of money in the United States; it is not at all a question whether the United States Government can make, *on its own motive and for its own sake*, tobacco or cotton a legal tender; it is not a question whether, upon its own motive and for its own sake, it can provide for any arrangement of money, except the most restricted one contemplated by the Constitution in any construction that has been pretended; it is a question whether, in dealing with the public debt and the public taxes, the public resources of income and the public sources of expenditure—whether, in grasping within its comprehension the whole sphere of its duties and of the obligations of the citizen, in reference to the financial authority, means, and administration of the Federal Government, they can interpose between this issue—this form of credit—and this final payment in gold that is to result according to the promise,—whether they can interpose this expedient for sustaining that credit, between the points of the issue and of the final redemption and satisfaction; and distribute the equality of the burden, which the necessities of the Government require to be borne somewhere, between these points of issue and of

redemption, by this transfusion and impartial distribution throughout the mass of the community, and in the transaction of private debt and credit.

Now, if the Court please, it will be seen at the outset, that this subject has the closest connection with the subject of money, and with that feature in the subject of money which relates to its being a compulsory legal tender in liquidation of debt.

My first proposition, then, is that *to determine what shall be the money of a country, and how it shall serve its purposes as a measure of value and a medium of exchange, including its efficacy as a legal tender in satisfaction of debts, belongs to government.* So, too, *to determine whether anything besides money shall be a legal tender in satisfaction of debts among its subjects or citizens belongs to government;* for, to determine that tobacco or cotton shall serve as a legal tender under the authority of government, does not make it the money of the Government necessarily. It is a provision, in terms and in substance, that something besides money shall, under some emergency and special motive to justify it, answer the purposes of money. Now, I do not imagine that any philosopher or statesman or politician would ever think of holding that this subject of the determination of what should be the money of a country, or how it should perform its services in respect to legal tender or otherwise, possibly belonged to that domain of private rights which should be withdrawn from all government. It is not a matter which touches our relations, which are deeper and higher than those of government. It does not affect the relations between man and God, nor the questions of personal liberty or of inalienable rights, or in any manner touch what philosophers and moralists and statesmen consider should, in the advance of society, be more and more largely withdrawn from the domain of government, as liberty of conscience and liberty of speech, and the right to property, to life, and to the pur-

suit of happiness. This is social, this is public, this is governmental; this is wholly circumstantial, wholly modal; and if there is anything that a community in coming together submit to the regulation of a common authority, it is this establishment of money, and this regulation of legal tender.

So, too, I submit to the Court, that the actual regulation of money and of legal tender in satisfaction of debts, is neither a principal nor a substantive power of government. It is a subordinate and administrative means, in aid of, in connection with, some principal and substantive end and duty of government. It has been employed, for its own sake, upon its own motives only, but always as a means, as a method, as a contrivance, for accomplishing some general duty, some general obligation. And I submit that the whole judgment to be passed upon the regulations by any government of this subject of the discharge of debt through the medium of money or whatever else shall be established as legal tender to that end, must be in reference to the wisdom or the justice of the means.

Now, in saying that, properly, in discussions of polity or of government, this matter of the money or of the legal tender of a country in the discharge of debts, is not to be regarded as a principal end or as a substantive power of government, but as only a means towards an end, a faculty in aid of a power, we are not to be understood as disparaging the importance of the subordinate and administrative authority, or of the limits which morality, which justice, may impose upon a government, or of the importance to the people of some adequate guaranties for the establishment and regulation of this means to an end, of this aid in execution of a power necessary to the public interests and the general welfare.

I have attempted to secure your Honors' assent to the general introductory proposition, that, in its own nature,

the regulation of the legal tender of the country was in the power of its government, and it was neither an end nor characteristic of government in any political or philosophical or public sense; but that it was an administrative and subordinate means at the service of government for the execution of some of its powers and some of its duties.

The learned counsel who argued against the constitutionality of this law, Mr. Potter, of New York, and attracted the attention of all of us to the force and dignity of his observations upon the general as well as upon the special considerations of the case, was disposed to question this in that form of criticism which has been often insisted upon, namely, that this is not an inherent power of sovereignty. These are general terms,—*inherent power of sovereignty*. He then proceeds to say that it is not an inference that it belongs inherently to government because governments (and this he admits) have always possessed it.

It seems to me, when you admit that in the experience of human affairs, in the arrangement of what belongs to the Government, and what to personal rights not to be subjected to government, this power of regulation of tender has always been in the possession of government, you admit almost all that is necessary to show that, in its nature, it belongs to government. But being still more specific, he says that it may be reserved to the people. It may be reserved from government, it may be denied and prohibited to government; but if it should be, then it is obliterated from the functions of society. Because, to say that the individual possesses the power of regulating the legal tender for the community or the power to have the legal tender conform to what suits his conscience and his interests, is simply to say that there shall be no legal tender at all; for it is by its compulsory feature of authority and of law, imposed by the consent of the community within which it prevails, that it comes to be legal tender, which authority is expressed



and enforced by that representation to which they commit what belongs to their common consent, that is, to government.

Let us not, then, confound this step of the argument which is to show that this power, this faculty, this means, this contrivance, subordinate and administrative, which always has been, and of necessity always must be, in the service of the government for its general purposes,—does belong to government in its very nature, with a subsequent step, which is to show that it has not been withheld by the people from the Government and thus obliterated from its functions, and has not been denied in the principal and organic law of our Government, the Constitution, so as to be no longer open to this particular, subordinate legislation concerning it which has been attempted. Both of these features might be found in any government established by man upon the consent of the governed, one that legal tender was withdrawn from governmental control, and the institution, therefore, no longer at the service of Government, and in the organic law itself, the Constitution itself, it had been established by positive enactment and within restricted and definite rules and laws of prescription which terminated the action of Government on the subject.

If it be, then, in the very nature of this subject, that the regulation of legal tender is a means and appliance of government, that it is impossible to range it within the personal rights and immunities which are withdrawn from all government and not left to the control of the consenting will of the people, the only question left for us then to determine, is, whether, in our Government, this authority to the extent and in the form and effect with which it has been attempted to be exercised in the act of Congress in question is within the permissive authority of Congress accorded by the Constitution. Now, this exercise of power by Congress may exceed its true authority under our complex system of government, for one of three reasons:

First, for the reason that the whole power is accorded by the Constitution to the States, and therefore any intervention by the Federal Government in regulating legal tender is beyond the powers conferred by the Constitution.

Second, because, though a certain measure of power over the subject is accorded to the Federal Government, this particular exercise of it, is beyond that permissive power.

Third, because this exercise of it, though within the permissive powers conferred upon Congress as a means to their execution, and, but for the prohibition, supported by due constitutional authority, is found to be prohibited by some express injunction of the Constitution.

I submit to the Court that, upon the established rules of constitutional construction, in dividing powers and in assigning or accepting means towards powers, familiar to the Court, it must be for one or other of these reasons, if at all, that, this exercise of authority attempted in this act concerning a subject which belongs to the sphere of government, is unconstitutional. Now, I submit that this exercise of authority by Congress is no encroachment upon any constitutional power of the States concerning the subject of legal tender. Whether or not it be withheld from the Federal Government, whether or not it be prohibited to the Federal Government, its exercise is no encroachment upon any authority concerning the subject that is reserved to the State Governments. It must pass out of the domain of all government, if it does not exist in the Federal Government and is not to be found in the State governments.

The principal argument in support of the pretension that the regulation of legal tender falls of itself, without regard to particular provisions in the Constitution on the subject, within the domain of State authority, is, that it has to do with, and is at the service of, the government that has charge of the general mass of personal, domestic rights and interests, which belong confessedly to the administration

of the State governments; that, in the contracts of the people, the relations of debtor and creditor, and the enforcement of the laws for the collection of debts, fixing the standard at which debts are to be measured when pursued at law, and when the authority of the government is to be exercised for their compulsory collection, it belongs to the State governments.

Now, at the outset, let us say that this presumption entirely fails of due support in the nature and reason of the case, in regard to all that mass of personal rights and interests that, in the very frame of the Federal Constitution, and at the bottom of the motive which led to its formation, were to be withdrawn from absolute State control. I refer to all those private interests and relations as they arise between citizens of different States, and as they arise between citizens of the United States and foreigners. So far, then, as it seems appurtenant to the administration of private rights and interests, there is no presumption that the regulation of legal tender in the settlement of transactions between citizens of different States, or citizens of the United States and foreigners, should be accorded to the State governments. The presumption is all the other way—that the final determination of these rights and interests by the impartiality of the General Government, should draw into the Federal authority a control over the State tribunals and the State laws, in regulating commerce by statute, as well as by judicial decision, between the States and with foreign nations.

But that presumption which, at the outset, is thus divided, ceases to have any weight, I submit, in the judicial mind when we find that the whole regulation of the money of the country, has been deliberately, exclusively, peremptorily assigned to the General Government, and that legal tender, which, as Mr. Mills says, in his *Political Economy*, seems to be inseparable from the idea of money, should be left, in the distribution of powers between the two forms of admin-

istration, to two different and independent authorities, can scarcely be predicable of any rational scheme of government. Show me, in the arrangements between domestic authority and general control, a deliberate conclusion that the money of the country shall be carried over to the Federal, and not left to the State authorities, and I deduce a presumption, I respectfully submit, that whatever is to be done by law and government concerning legal tender, must by the same reasoning, and on the same motives of duty and necessity, be carried to the General Government. Confessedly, then, whatever general authority the States have left with them concerning contracts, debts, duties, rights, and interests, between citizen and citizen, and the enforcement of them by law, so far as all these feel the modifications, the influence, the operation of the money power of the country, they must feel it as lodged in the General Government. We understand, I think, the wisdom of our ancestors in making this distribution of authority. We are to make a nation of many States as towards the world; we are to make a nation of many States as among the States themselves. We are to bring together in bonds that unite, all that belongs to the necessary conditions of union; and while we will leave, will sedulously leave, all that is of local and domestic administration, without interfering with what must properly belong to the concerns they have in common, we will, nevertheless, as sedulously and as firmly, insist in grouping under the powers of the Federal Government all that should subtend the entire area of the Union. While, therefore, they have the arrangement of their courts and laws, of their process and their methods of proceeding, yet the subject of the solution of debt by money, we hold as appurtenant to the interests which bring them into one union,—that therefore the General Government must control it.

Now, has not Congress—has not the Federal Government—the whole power over the money of this country? I

am not now arguing that it has the plenary power that may be assigned to sovereignty theoretically, that it is not curbed. But has it not all the power that there is? Have the States any power? "Congress shall have power to coin money, regulate the value thereof and of foreign coin." "To provide for the punishment of counterfeiting the securities and current coin of the United States." "No State shall coin money; emit bills of credit."

Now, if the constitutional money of the country is that which, in its nature, is susceptible of coinage, if that is all the money that there may lawfully be in this country, which is one part of the assumption of those who oppose the constitutionality of this law, then confessedly the Federal Government has the complete control over the subject. Whatever laws, therefore, may be made for the collection of debt by the different States, however feeble or vigorous their processes may be, when the obligation reaches the point of debt measured in money, it is measured in the money of the Federal Union.

But more closely than this, though, as I say, we must, almost by a necessary presumption, hold that, if the power of legal tender is not suppressed and is not modified or curbed by positive provision in the Constitution, all that there is of it must be in the Federal Government from the fact that the money power is wholly in it, yet we see that the subject of legal tender, to avoid any controversy on the subject, has been, as I shall submit, wholly taken away from the States.

Now, the express prohibition upon the States is in a form which carries an implication, I agree, that they may have some authority on the subject of legal tender—an implication, which, if it stood alone, would need to be observed as a substantial faculty in the State governments—namely, that they have some control on the subject. It reads, "No State shall make anything but gold and silver coin a tender in payment of debts."

There might have been a prohibition in the Constitution that no State should make any law regarding legal tender. But that, if the Court please, would have carried the prohibition into a region where it should not reach; for it would have covered the laws as to the time and manner and mode and circumstances in which a tender, to be effectual in judicial cognizance, should be accomplished, with which we have nothing to do; for instance, that it should be in the presence of witnesses, that it should be with so many days notice, or any other minor arrangements that properly belong to the administration of local justice. Therefore, this prohibition having only the object of securing the State against the interference from what should be the subject of legal tender, so far as they were concerned, their authority took this form: "No state shall make anything but gold and silver coin a tender in payment of debts." But this implication, that the State may have something to say in its legislation concerning the legal tender, provided it be kept within gold and silver coin, is manifestly controlled from any diversity or contradiction in its legislation as to the legal tender which gold and silver coin shall serve, by the prescription in the affirmative authority in the General Government, of the whole regulation of gold and silver coin. Regulation both of its production by coinage and of its value as legal tender, is the regulation that is designed by this ascription of authority to the Federal Government.

It is, therefore, impossible to place your finger upon a single authority left in the States, to decry or to exalt any form of the legal money of the United States, or to pre-cribe a rule or manner in which the coinage of the United States or the foreign coinage regulated by the United States, shall serve as a tender, otherwise than as according to the regulation and the coinage which the Federal Government shall have established.

I submit that this argument which will be found running

through these cases that, without an act of Congress, in terms undertaking to say that a certain amount of gold bullion pressed into the shape of an eagle, having the image and superscription of our Government's authority, shall be a legal tender at its face, without any such express assignment of efficacy to it when it is coined into eagles,—that it is when coined into eagles—this value of bullion—ten dollars—made a legal tender all over the United States wherever ten dollars is the measure of obligation. And if this authority is exercised only in this form and to this extent of coinage and regulation of value for gold and then for silver by the Federal Government, may I be told that a State has a right to say that the gold dollars, the gold eagles, to which you have assigned this value, shall not be a legal tender, and that the silver dollars only shall? Is not that decrying the regulation and the money regulated by the Federal Government, if the gold eagles are proscribed from service as a measure of debt? Any implication, therefore, that, in the States, there is left any authority to legislate concerning legal tender in regard to the weight or value, or efficacy or preference of gold or silver coins, either foreign or of our Federal coinage, is wholly illusory. The prohibition to the States does, by implication, give authority concerning the form and circumstances of law regulating tender, as respects the time of day at which it may be made, the presence of witnesses, the presence of the coin, the substitute of paper money as adequate, if no demand is made by the creditor that the coin shall be produced, and other regulations of that kind. But of all that relates to the measure and efficacy of gold and silver in the payment of debts in any State of the Union, the Federal Constitution by the prohibition on the States to make anything but gold and silver coin as tender, and by the ascription to the Federal Government of the whole regulation of the gold and silver coin of the country, has left nothing in the States.

And this, if the Court please, is precisely what, *a priori*, we should have expected. Certainly you are not to have two governmental regulations in this country about legal tender. If you have two, and one of these is capable of being diversified into varieties of policy by forty different States, what have you accomplished in assigning the money power to the Federal Government? What have you done in giving Congress the control over commerce between the States and with foreign nations, if this first implement of traffic, money, the measure of value and medium of exchange, is not capable of regulation by Congress? It falls within the general policy, therefore, that what could not be left to diversity of legislation must be lodged where unity could have dominion.

I may be permitted to refer, as a very brief indication that this was the effect, and this the motive, of the provision on this subject in the Federal Constitution, to a short passage in a letter of the Connecticut delegates to that State, commending the Federal Constitution to it for adoption. They were Mr. Sherman and Mr. Ellsworth. It is quoted on page 9 of my brief, as follows: "The restraint on the legislatures of the several States, respecting emitting bills of credit, making anything but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* law, was thought necessary as a security to commerce in which the interest of foreigners, as well as of the citizens of different States, may be affected."

It was, then, within that motive which carried a large body of principal powers, and of necessary means in execution of those powers, to the Federal Government that this provision was incorporated in the Constitution, and the rigor with which, in the consideration of the subject when framing the Constitution, all possible authority, even with the consent of Congress, was withheld from the States, is shown by the course of the debates. As it stood in the



report of the "Committee on Detail," the provision was this: "No State, *without the consent of the legislature of the United States*, shall emit bills of credit, or make anything but specie a tender in payment of debts." But this was rejected under the peremptory motive, that what belonged to the Federal Government should not be yielded temporarily, under any possible consideration, to the dominion of a State.

Having thus disposed of any scintilla of governmental power on the subject of legal tender, in the value and in the substance to be used, being lodged in the States, it is necessary now to see whether there are any positive prohibitions upon the Federal Government defining, limiting, curbing, its authority on the subject. And I am sure I need not argue in support of this proposition, that the Constitution contains no word of prohibition, of limitation, or of exception touching either of these questions.

First, the regulation of tender in payment of debts. It would have been very easy to have included in the Constitution an absolute prohibition or a modifying authority and restrictive power; but there is not one word of prohibition, of limitation or of exception in regulation of this means and appliance of government, to wit, legal tender, to be found in the Federal Constitution.

Second, there is not one word of prohibition, limitation, or exception, in regulation of money, its currency, and its efficacy in the payment of debts. There may be a limitation as to what money is or may be; but there is none affixed to this affirmative authority concerning it.

Third, it is equally true that there are no such words of restriction, limitation, or prohibition, touching the form, vehicles, terms, or conditions, in and on which the public credit can be issued by the Government in the performance of its constitutional duties or the exercise of its constitutional powers—none whatever; no limitation of the amount, no

limitation of the terms, or of the conditions, or of the means, to constitute currency, to give credit, and to accomplish the objects imperatively demanded to be executed by the Government.

Fourth, there is no such prohibition, limitation or exception touching the regulation of contract by the General Government, except indeed what would be implied from the nature of government, that all its bankrupt laws are to be uniform. We have thus far cleared the subject of two important considerations: first, the States have no authority in the premises; second, the Federal Government, in terms, submits to no restriction, no limitation, no prohibition in the regulation of this subject.

Now, I contend, may it please the Court, that these propositions alone exclude the conclusion that the Federal Government has not authority in the matter of legal tender, as inconsistent with all established rules of constitutional construction. The general notion of our Government is this: that, as between the Federal Government and the States, the Constitution is to divide the powers of government as the welfare of the people has suggested to the wisdom of its framers; that what the States should not retain or possess, the General Government should have; that what the General Government does not have, the States should possess. Then there is another fundamental, perfectly intelligible idea running through, not only our Constitution but the constitution of every free people or of every people advancing to freedom, and that is, that a certain area of personal rights and personal immunities shall be withheld from all government and left to the individual, independent: rights of conscience, freedom of speech, freedom of the press, which has come to be added as another form of freedom of speech—all those ideas with which we are so familiar, which, in the important stages of the progress of political science are not accorded to any government. But, in the original

design of the Federal Constitution, it was not thought very important to take notice of this area of individual and personal rights, because so long as the General Government took only the powers accorded to it, and left the rest to the States, it was for the States in their constitution to discriminate between what they would regard as properly within the service of government and what should be left to the freedom of the citizens. In that way it is explained that the original Constitution had scarcely anything that could be regarded in the nature of a bill of rights. And although contemporaneously, that defect was noticed, and its supply promised in some way, should the Constitution be adopted, it was not until the amendments were introduced that anything in the nature of a bill of rights in the Federal Constitution was found. That necessity and wisdom, for such I regard it, came from this: that, although the original idea of leaving the States to discriminate between their powers of government and what they would leave to their people, was just, yet the very nature of the frame of the Government, of limited scope, yet with sovereign powers within that scope, carried a possibility and a peril of encroaching, in the exercise of the powers within that scope, upon the rights of the citizen.

However, it was feared that, although there was no express power given to Congress whereby it could make a law respecting religion or abridging the freedom of the press, yet there might be found in the exercise of the affirmative powers accorded to it, a temptation, or a need, in the opinion of the legislature, to encroach upon this domain of individual rights. It was, consequently, provided, in limitation of the express powers, that they should not be construed to contemplate a possibility of the invasion of this sphere of personal rights. But, when we are dealing with a subject that has no concern with personal rights, is no part of individual manhood, but is, in its very nature, a regulation

framed for society and under its authority, then you have this only to consider, whether this power, belonging to government, is limited in the Constitution or is assigned to the States.

Now, to hold otherwise is to hold that a certain subordinate, administrative means, familiar to the experience of all government as a part of its financial system, as well as its regulation of justice among the citizens, has been expressly prohibited to the State governments, has not been added to the immunities of the citizens, has not been withheld by any express prohibition from the General Government, and yet by some insensible, unnoticed evaporation in the process of distributing powers between the two Governments, passed out of the resources of government altogether. Now, do we not all know that, if this exercise of legislative authority, which Congress has deemed to be lawful, was needed and was useful, and yet was not permitted to the Federal Government, the State governments could not have given us any aid? The Constitution prohibited it. It is, then, left out of government.

Now, I submit that the true presumption and implication is, that when the prohibition of what belongs to government, is applied to the States, it is understood to belong to the General Government—I say, what belongs to government, what is necessarily a part of government. If that be denied to a State, the presumption then arises that it falls within the means and appliances that should be at the service of the general and common powers of government applied to the common interests. There may be a presumption that, if the sum of political authority which is necessary and useful in government has been diminished and curtailed in the division of it between the States and the Union, you may find more of it on one side or more of it on the other; you may have rules of construction, prejudices, theories, that will carry more on the one side or more on the other; but there

is no presumption that the arm of government is shortened by this division of its authority, unless you add it to the immunities of the individual. As a matter of direct constitutional authority, the mode of suppressing a power of government, that is, within the ordinary means and appliances of government, is by a prohibition to both the Federal Government and the State governments.

Now, I do not by this carry any conclusion or argument that principal powers of government go by inference, but that what are means and appliances in aid of government enure to the service of that government that has the principal duty imposed upon it, in the absence of prohibition. There are several instances of this double prohibition by which there is a suppression of a certain faculty of government. Both the Federal Government and the State governments are prohibited from granting any title of nobility; both are prohibited from passing any *ex post facto* law; both are prohibited from passing a bill of attainder. All these proceed upon the ground that either of these governments, within its powers and duties, might have had recourse to one or the other or all of these subordinate and administrative applications of authority: the General Government, in support of its duties to build up and strengthen the national polity, might claim to make distinctions of rank in the army or in the civil service that should have a permanent character; the States, within their dominion, might claim the same as a subordinate, ancillary administrative means. So with *ex post facto* laws; and so with bills of attainder—each passing bills of attainder within the sphere of treason perpetrated against either government. There you have a suppression of certain powers of government which are not left in our system at all, just as you have an enlargement of the area of personal immunities by provisions affirmatively in the nature of a bill of rights. But our Constitution contains one instance of this double prohibition of what must

be regarded, in its nature, as a subordinate means. I refer to the prohibition of exacting revenues from *exports*. Now, what is more in the nature of a subordinate means than that? Apparently that should be at the service of every simple government. Under what motive was that prohibition made? It was made in view of the difficulties of determining whether the States or the National Government should control duties on exports. The power was denied to both as a source of revenue, with this limitation, that a State may lay a duty on exports in support of its inspection laws; but the revenue arising therefrom must go into the Treasury of the United States. Practically, revenue on exports is excluded from the powers of both governments, not by inference, but by express prohibition. This was fully understood during the late Civil War when the propriety and necessity of looking to exports for some measure of revenue, was considered by Congress, and the express prohibition in the Constitution was regarded, as every express prohibition should be, as final on the subject.

The Tenth Amendment of the Constitution seems to me, in its just construction, to support this implication from the denial of a power to the State governments, that it is in its nature subordinate to administration under the general power of the Federal Government, that it is with the General Government; for the language of that amendment was intended to be, and justly, a barrier against implications of affirmative powers. This is the provision: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."

Of course, then, anything that is prohibited to the States, you cannot treat as reserved to the States; and as to whether it is reserved to the people, that primarily is a question between the States and their people. If it is wholly withheld from the States, it cannot be a question whether the people should have it as between them and their State government.

Never overlooking the principle that this is a Government of affirmative powers to be found in the Constitution, I submit that, under the language of this Tenth Amendment, a means prohibited to the State is presumptively within the authority of the Federal Government or within the limits of its principal powers. If, then, whatever regulation of legal tender is possible in our Government, is with the General Government, there are but three ways in which it can be disposed of: either the Constitution has fixed it, which it might have done; it might have declared in so many words, that legal tender in payment of debts, as the supreme law of the land, is and shall be current coin authorized by the General Government; or, there is no legal control whatever; or, Congress has some authority in the premises, and whether that measure of authority be large or small, all of it resides in the General Government.

Now, it is very plain, as I have heretofore stated, that there is nothing in the Constitution, in terms, fixing the legal tender of the country. If the power to create money and fix its value carries any power of legislation,—if the other enumerated powers of Congress carry any power of legislation, then, as within, and in aid of, those powers, Congress has it. We come, then, down to the question, whether under the description of legal and necessary legislation in support of and in execution of the powers of this Government, Congress has that power.

Now, I do not hold that these notes of the Government are coined money, or that their issue or authority depends at all upon the fact that they are coined money. They are *promises* of the Government; they are debts of the Government. They are expressed in dollars as the measure of the Government's debt and promise, and those dollars thus named as the measure of the Government's debt and promise, are the dollars of the Federal Constitution. A promise is not performance, and the dollar is yet to appear if these

promises are redeemed in performance of the promise—and the dollar is a coined dollar of the United States or of foreign countries accepted by the United States legislation. “The United States will pay the bearer ten dollars. Payable at the Treasury of the United States in New York.” And “This note is a legal tender for all debts, public and private, except duties on imports and interest on the public debt, and is receivable in payment of all loans made to the United States.”

As I have said, the issue of that promise is constitutional; it is within the authority of Congress to provide for its performance; it is within the authority of Congress, provided no excess of power is resorted to for that purpose, to secure its acceptance and currency with the people as a promise of the Government to pay dollars. There is this further provision, covered by the legislative promise in the section under which this currency is issued, that at any time this form of the public debt may be converted in sums of fifty dollars or multiples of fifty into another form of the public debt—a postponed loan—the interest of which is payable in coin and the principal in coin. These are the provisions, and all, I submit, are constitutional.

The Government has proceeded to say further and intermediate to the issue of this form of public debt and its presentation by the holder for redemption in money or for conversion into the postponed loan of the Government, it shall pass from hand to hand among the people of this country as a satisfaction of their private debts. This is the feature to be considered. Now, what are some of the principal purposes of money? It is a measure of value and also a medium of exchange. As a measure of value money may rest in account; there may be money of account, which has no coin to represent it, but which serves the purpose of a measure of value in computation; so that a bale of cotton or a cask of wine which you cannot in their material bulk make a common



measure of value, yet being worth so many pounds and shillings may be deemed sufficient in account. As a medium of exchange, which is the purchasing power of money, the great science of money is that it should retain this purchasing power in the confidence of the community, and provided that permanent confidence at a fixed standard can be secured in favor of any money, the less the intrinsic value of wealth that is put into money, the better for all. The gold money, the silver coin, is, as Mr. Mill, in his *Political Economy*, says, but a form of tickets or orders by which the holder is authorized to obtain whatever he needs, and the confidence that these tickets and orders will, under all circumstances, obtain what he needs, is the value of the contrivance of money as adopted by civilized nations; and, as he adds, aside from this, and he is no partisan of paper money, he abhors inconvertible paper money as much as any one can do,—as a contrivance merely to adjust these relations, money, he says, is the most insignificant thing in the world.

The intrinsic value of metallic money serves only this purpose: there is this self-acting check against its excessive use, that no more of it can be issued than there is, and none of it can be got except by labor, which makes it a standard of value. It is that self-acting check which makes the metallic money the basis of circulation, to which the whole currency of every safe and just government should be anchored. But, as we all know, political science has shown that, because you must have your currency anchored to this natural and self-limited measure of value and medium of exchange, it does not follow that you must limit the service of exchange and of measure of value to that money, and have only the transactions to which the specie of the country may be applied bodily and by transportation in every transaction. Whenever you can give to forms of public or private credit the true hope and guarantee that they shall bring all the money that they purport to represent, then you have en-

larged the means and stimulated the activities of commerce and of trade without having shaken the basis of specie as a measure and as a medium. The distinction, therefore, between currency and money is perfectly understood; bills of exchange being the first form of currency distinct from money, then promissory notes, then public emissions of promises of Government, then private bank notes—all being different forms of credit or confidence that the money they promise shall be forthcoming whenever the holder needs it. So that the expression of Mr. Mill is clear, when he says that these different forms of credit either in the less manageable form of book debts, or bills of exchange or promissory notes, are really currency, and in the form of bank notes and of public notes of exchequer, are a form of credit which, as it seems, he very aptly describes as coined credit, while the other forms of credit are, so to speak, credit in the ingot or mass, and very aptly describe paper money in its relation both to credit or promise and to value or intrinsic faculty of purchasing.

Now, every nation coming into the modern system of civilization at least and having currency by necessity for the freedom of the movements of its people not limited to gold and silver coinage, but to credit mixed with it in all the manifold forms that ingenuity and the science of political economy has invented and approved, has to deal with that whole subject of money *per se*, and credit that enters into currency in aid of, *pari passu* with, any expansion of the money arrangements of the country. It has to deal with it in peace and in war; it has to deal with it under circumstances of the greatest diversity. It has to deal with it according to the powers of government and its wisdom, under stress financial and national.

When government, therefore is charged with these duties and responsibilities, the question is, of any attempted exercise of authority, whether it be within its power and be serv-

iceable to its duty or not, and that question is to be answered according to the nature of the exercise, the motive, the service intended, and the circumstances under which it is situated, by the Government. Let me now call the attention of the Court for a moment to the difference in operation of an express power and of an implied power. An express power whenever accorded to the Federal Government can be exercised upon its own motives and with no other reason or object of duty, except that it is within the express power. Take the subject of emitting bills of credit which was discussed in the Constitutional Convention as to whether it should be assigned as a substantive, enumerated power to the Government of the United States, and was omitted after full consideration from that list. If it had been inserted as an express and substantive power, then the issue of bills of credit for any purpose would have been within the power of the Government, that is so far as their emission went. Their motive might have been to ease the finances of the country under any circumstances, and in any exercise of any power or duty of the Federal Government. It was excluded. Take the power of chartering corporations. That was postponed as a substantive power by Mr. Pinckney and again by Mr. Madison, with certain limitations. This was excluded as a substantive power. If it had been included in the Constitution then Congress could have established corporations in its discretion. If that had been inserted as a substantive power, then Congress would have had power upon its own responsibility of reason and motive, without any judicial amenability whatever, to establish corporations of any diversity and on any subject. That was excluded.

How is it, now, about this legal tender question, which is specially under consideration? These notes, if not made legal tender for private debts, yet are an emission of bills of credit within the meaning of the Constitution of the United States which is prohibited to the States and which is not

expressly conferred on the Federal Government. The two cases of *Craig vs. the State of Missouri* and *Brisco vs. The Bank of Kentucky*, in 4 Peters & 11 Peters, discussions familiar to the Court, show that emissions of public debts are bills of credit and would be the very things covered by the clause in the Constitution, "emit bills of credit."

If a State does it, they are invalid, and if the United States does it, they may be valid although no express power is given them, but, on the contrary, an express power was withheld from them in the Constitution, after debate. Here you have all the grounds, all the arguments, which bear upon the matter of legal tender, on this subject. The incorporation of the Bank of the United States was a subject which came up for discussion, and with it these facts in constitutional history, that there is no express power to establish a bank, and that when it was proposed to the convention to confer an express power of incorporation, it was withheld. What is the reasoning of the Court? As an express or substantive power, justifiable upon its own motives and for its own sake, it has no place in the Constitution of the United States. You must bring it within the terms of means or of legislation necessary and proper, within the scope of some express power and upon its reason and within its motives, or it does not exist. And the incorporation of the Bank of the United States was held to be constitutional because under the motives and upon the reason and within the limits as means to ends, adapted and conducive and appropriate, which are within the service of enumerated powers at the disposal of the Government. And so bills of credit, if they came up nakedly without this question of legal tender and private debt, would stand upon the same reasoning and have never been questioned as being unconstitutional.

The difference, therefore, between express and implied power, is not an unsubstantial difference, although the very thing that might have been raised to the dignity of sub-

stantive powers upon its own motives, has been withheld, and the same thing is introduced into legislation as means to ends. The difference, I repeat, is essential and important, and no true liberty of means towards ends, of appliances in aid of powers, ever can enlarge the powers of the Constitution of the United States; for the judicial and political theory of these means and appliances, as being lawful, is that they are included in the service and in the aid of the substantive powers.

Now, the authority to make coined money a legal tender by law is included within the express power of regulating the value of money; and cannot and has not been disputed. It is for me to satisfy your Honors, if such be the true construction of the Constitution, that the making of these emitted bills of credit of the United States a legal tender in transactions between private parties, is within the authority of Congress, as a means necessary and proper, appropriate and adapted, to the discharge of the duties thrown upon the Government of the United States, by the Constitution and in exercise of the powers accorded to it; knowing as we do, that unless it resides in the Government of the United States, it does not reside in the power of the States, and that the political and financial situation in which this recourse, always possessed by governments, though denied to ours, is left without remedy and without succor.

Now, I believe that the framers of the Constitution may be well understood to have formed their Government for the actual affairs of men and the vicissitudes of national fate. They did not expect to change the nature of man or to control events, and they did not frame a government to escape them, but to meet them. They were familiar with the conditions of peace and war by the most recent experience, and they knew, not as matter of theory, but as matter of fact, the diversity between the burdens and responsibilities and duties which belong to one state of the nation and the other. War

is the state of a nation which prosecutes its right by force; peace is the state of a nation in which its law prevails by its authority. It is not saying too much, that, without imposing any qualities upon these two conditions of peace and war, except what by inexorable necessity is demanded for war, as in time of peace all the force of the country is but the aid and minister of its law, so in time of war all the law of a country is but the aid and minister of its force; it is the situation of the nation when its force must be displayed and exercised and marshaled and directed only under the conditions that it be adequate, proper, and seasonable, to maintain the public safety.

I give to the law of the country no extension beyond what its fundamental charter gives it; but, within its power, the occasions and duties of a state of war are that the whole strength of the nation shall be marshaled by its legislation in the most effective and useful way to preserve the national existence and to attain peace. The laws by which private conduct is governed when the person is safe and life secure, are one thing; the laws of self-preservation in the individual are another; and one law yields to another in morality according to the situation. "Thou shalt not kill" is the law of peace and safety to the individual. In preservation of life, you may kill, is the doctrine and sanction of conduct under those circumstances. Our life is to be preserved, that it may be regulated by morality, and the morality of its preservation is, that whatever means in strength, in wisdom, are at our service, may be exercised according to the stress of the emergency in which we are placed.

I shall give these principles no extravagant operation. I agree that the final law of this Government, found in the Constitution, is the curb and limit of the political authority just as much as the strength which nature has given to man is the curb and limit of his efforts in self-preservation. I only ask that you shall accord to the framers of the Consti-

tution, in the judgment of their work as applied to this emergency in the national situation, the wisdom and circumspection that belong to them, and that is, that they deemed a state of war as within the fortunes of the nation they were founding, and that they were familiar with the stress of war in its demands upon the strength of the nation, natural and financial.

Now, in the main design in the Constitution, to carry to the General Government all that was of common concern, there is nothing more prominent than this: all that belonged to a state of war was and should be of common concern; in peace there was a distribution of administration between the General Government and the States, but all the exercise of power and strength in war was adopted by the terms of the Constitution as being of general concern and not of State authority, and was comprehended in that larger reason which carried over whatever was general, in the power of the Federal Government.

They had in their minds, also, under the freshest experience, as among the consequences of impressions that war produces in a nation, that the whole system of money, currency and credit, public and private, legal tenders, contracts and their enforcement, and the compulsory payment of debts, are subject to the shock of war as much as any other of the interests and operations of a nation, and that the pressure upon the powers and duties of the Government in the event of war, in respect to all these subjects, was entirely different from what it was in peace. They were not insensible to that fact; they had experienced that very situation in the conduct of the Revolutionary War, that while the Federal Government was charged under the confederation with the operations of war and their control, it had to look to the States for the execution of power to aid it. Among the very points, therefore, bearing upon the exercise of the authority of war, this question of legal tender was in

their experience, and in this precise form; that while they had authority to pledge the public credit by the emission of the public securities, they had not power to make them a legal tender, and they had found that that was a necessary reinforcement of their currency and their value; that is, in their judgment, it was. Whether they judged wisely or not, is a political question. In their judgment, they did. They were obliged to ask the States, just as they were, to contribute by their legislation this aid and help to the credit of the country by their passing laws in aid of the emissions of the confederation, being legal tender, and the States did it, putting it upon the ground, as in the legislation referred to by Mr. Potter, of upholding by penal sanctions the currency of the money of the confederation, proscribing as an enemy to the country any man, who should say or act in derogation of this faculty of the money, the emissions of the confederation debt, being a legal tender. This then was the experience of the framers of the Constitution. That is, of all other nations, so of this, as in the past so in the future, the exigencies of war which demand the marshaling of the whole physical strength and all the financial resources of the country in aid of the country struggling against foreign or domestic foes, there must be a resort to the means of legal tender as one of the resources of government; and they knew that in the confederacy they had to ask the State; for it, as the States had it, and they knew what they were going to do on the subject of leaving that authority with the States.

Now, too, it is not to be disguised that the temptations and mischiefs and dangers and disgraces of an inconvertible paper currency were equally pressed upon the attention of the framers of the Constitution. The actual condition of the country in the collapse and in the delirium, if you please, that had followed the exhausting war in which the liberties of the people had been maintained, and all the evils of the public and private credit of the country that the actual



situation of affairs exhibited, were in their minds also. They knew that this potent service of paper money in a need, was in danger of being a master too strong to be thrown off, suddenly at least, when the need had reached its limit.

Now, I say, the most opulent nation, and ours was not an opulent nation when the Constitution was formed, that the most opulent nations had been obliged under the stress of war to resort to this invigoration of the coined credit of the country to aid the purchasing power of its public debt. This was familiar to them also, and they knew after the war had passed, and this means had been resorted to, that in the experience of other nations as well as their own, the danger of expanding it as a power, or the exercise of the power beyond that need, was a thing to be considered, and carefully and firmly dealt with.

I submit to the Court, therefore, that the true construction of the arrangement of these conflicting interests and arguments of the Federal Constitution, is plain, and further that it was wise, though, whether it be wise or not, if it be plain, the judicial duty is satisfied by enforcing it. It is, that the States of this country, who were relieved by the new Constitution from all the burdens and responsibilities of the legislation and management of war, should have no authority that could make legal tender out of anything but intrinsic value. Whatever stress in time of peace may go unprovided for, for disasters may happen, earthquakes may happen, great destruction by pestilence, by flood, by fire, may disorder the natural condition of the people almost as much as war,—but the feature of peace was not of that kind or nature, and as the States had none of the powers and responsibilities of legislation and management for a state of war, this faculty should be suppressed in them, although some particular unforeseen stress might have shown that a more circumspect and more farsighted civil prudence would have given a faculty of meeting this strange emergency. But practically

they dealt with it in this manner; that the States have no power, as we all know, to liberate the legal tender and conform it to any exigencies; but that the General Government, whose money and credit—that is all that it is—are to furnish all the financial sinews of every possible war, should have at its disposal in this service, in this necessity and within this duty, this financial expedient of making the public securities a legal tender; else, what is not to be tolerated in any form of society, an inexorable need and a peremptory duty should miss a commensurate power. I do not care what structure it is, mechanical or civil, if you send it forth to meet an inexorable need and under a peremptory duty, you must furnish the necessary power, and in so far as you fail to do this, your structure is imperfect and falls under the law of its own creation as inadequate to its own obligations and necessities. Such structures may be deliberately made, such structures, in the imperfection of human affairs, are made. A ship may be sent across the ocean for aught I know, under a deliberate determination that, if the wind blows thirty knots an hour, it shall go to the bottom of its own structure. But when I have a list of the specifications of the ship's structure and equipment, I want to have pointed out to me the limit that made it necessary she should be a thirty knots-an-hour gale ship, and not one to meet a sea on which she was launched where the wind blows swifter than that. So with a government that is launched to keep the seas perpetually, over every commotion of the ocean of life, and through every storm of the future. I wish when the perils are known and measured and foreseen, to have express evidence that it should yield rather than resort to some energy to save it. If it be so, then let it founder according to the predestined law of its creation.

This power of legal tender, necessary for emergencies, pernicious as a ready resource, shall not be placed among the enumerated powers of the Constitution, because it would

either be at the service of the Government as a financial expedient on its own motive and upon any representation that it was useful in the service of the community—a position which Mr. Madison came very near taking in his message to Congress when he recommended an emission of bills of credit without the legal tender clause, when the credit of the country no longer required it, but as a convenience, as a medium of exchange. That illustrates the difference. I suppose the emission of bills of credit, if an enumerated power in the Constitution, would have been within the faculties of the General Government upon the motive of providing a currency merely without regard to the needs of the Government or by aiding it by such an emission.

I have no doubt, Congress never doubted, that if within the implied powers of government, it reposes there as a means at its disposal in aid of the credit of the country, upon its authority to lay taxes, to raise revenue, and to borrow money, and to administer the finances of the country. So, too, this power of resort to legal tender, as a servant of special duties and of authorities of the General Government, I place in the implied fitness and necessity of it as a means under emergencies of supporting the power of the Government in performing its duties, within its recognized obligation and in aid of its recognized authority. Such, I think, is the adjustment in the Constitution of these conflicting interests and arguments, and I am at a loss to perceive why anything in the history of this country should show, either in the general course of the Government or in this last emergency, when its safety required all its power, any reason to question the wisdom or forecast and prudence of the framers of the Constitution, if this be its true construction. Under it, certainly, we have had eighty years of government, carrying us through peace with all its vicissitudes and through the pressure of foreign war without resorting to this as a means in aid of any necessity. It is only when we come to a

civil war, the vastness of whose proportion and the intensity of whose energy, have crowded within five years, expenditures from this Government equal to the revenues of fifty years of peace, that this exceptional and excessive expedient spoken of in the ordinary affairs of the nation, has been resorted to.

Now, it is idle to say, as is often said in the course of the argument, that our experience of eighty years of peace, and of wars somewhat severe, certainly, upon our financial abilities—the War of 1812 and the War with Mexico, for instance—have been gone through without a resort to this expedient, and that this should prove a reason and be a guide in the construction of the Constitution, that no such expedient can be resorted to. I submit that it is only when some adequate and equal comparison that shows a nation saved through a stress and pressure equal to that through which we have passed in the last five years, without a resort to this expedient, is presented to us, that, in the experience of human affairs, we find any justification for thinking that the perils in which this country was placed could have been passed through without this resort. No simple government that the world ever saw, as far as my knowledge or estimate of history goes, has ever been able to subdue a revolt covering so vast a territory and so large a population of equal character and condition with the loyal population who came to the aid of the Government, as ours has done. I believe that no simple government would be equal to it, and that it is to the Federal distribution of authority that made loyal States cope with disloyal States through the common agency of the Federal Government to which the loyal State adhered, that our success is due.

I am, in the profoundest and extreme doctrine, an admirer of the State constitutions, their vigor, energy and protection. But you might as well say that the sick man argued wisely who recounted to his physician that he passed through the

diseases of childhood and had never taken calomel as a reason under the congestive fever of the marshes, why he should submit to no other stronger doses than had saved him from the mumps and chickenpox. Necessities impose their own measure: diseases their own remedy; and though you may be misguided and though the remedy may be sometimes worse than the disease, this false reasoning of refusing to make the measure conform to the actual situation before you and submitting to the wisdom that must be the master of the discretion and the remedy—such reasoning I never can understand.

We must now understand, if the Court please, how it is and why it is, that the Federal Government, being charged, as I have said, with all the duty and all the responsibility of the conduct of the nation in time of war, all such things being absolutely denied to the States as well as affirmatively devolved upon the Federal Government,—how it is that this situation of the nation may justify, may necessitate, within a national and legal estimate of the adaptation and appropriateness of means to ends, the particular measure which was adopted by our Government in the year 1862. I will but call attention to the powers I have collected in the 8th proposition of my brief, as making up the sum of powers as well as those distributively accorded, I suppose, to the support of this exercise of legislative authority. The Government then has power “To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States:” “To borrow money on the credit of the United States”; “To regulate commerce with foreign nations and among the several States”; “To coin money, regulate the value thereof, and of foreign coin”; “To declare war”; “To raise and support armies”; “To provide and maintain a navy”; “To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions”; “To

provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States"; To guarantee republican governments to the States and protect them against invasion and domestic violence.

I will not draw attention to the inhibitions upon the States to engage in war or keep the means of war. A war as between themselves was, of course, denied to them in the very nature of the institution of a common government; a war against foreign nations was denied to them as belonging to the General Government to regulate all the relations and to determine upon the condition of peace and war, *ad extra*. Here, then, you have collected in this mass of powers all the duties, all the authorities, all the responsibilities both in regard to military operations and array, and to financial management, that any nation ever had.

I do not now discuss the distribution between executive and legislative power in the Government of the United States. I say that, as between the General Government and the States, and as between the General Government and foreign nations, all the powers, all the duties, all the obligations, that any nation ever had or could have, are deposited with the General Government. Again, by an express provision in the Constitution as well as by necessary intendment, all the legislation that is necessary and appropriate to the performance of those duties, the exercise of those powers, the discharge of those responsibilities, and the crowning end of all, the safety of the nation, should belong and does belong to the General Government. So far we must all agree.

Now, the judicial criterion of the appropriateness and the adaptation of means or of legislation to ends, and in support of the powers and duties of the Government I need not enlarge upon. It is not a political criterion; it is not a criterion of wisdom or distinction. It is but a judicial criterion—that so long as we treat our Constitution as a Constitution of

limited authority, subject to judicial interpretation and to judicial curb of all violations of it, it must be guarded and must be bravely and firmly administered by this Court; but not beyond the judicial criterion as laid down by the celebrated Chief Justice who framed so much of the operative power of our Constitution in his elucidation of its principles and wisdom, and of its methods. This rule acceptable to all for its intrinsic and perfect reason, has been established: "The sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people."

Let us look at that rule, as it contemplates a state of war, the duty of the General Government in time of war, and the powers assigned to it in discharge of those duties. "There must be the means which will enable Congress to perform the high duties assigned to it in the manner most beneficial to the people"; not that it may use such means as barely to accomplish the object, but to use them in a manner, to be most beneficial to the people. Again, "Let the end be legitimate, let it be within the scope of the Constitution and all the means which are appropriate, which are plainly adapted to the end; which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." Under that the Bank of the United States was sustained in time of peace; under that the embargo was sustained in time of war. Under that in the case of the *United States vs. Fisher*, in 2 Cranch, the duty of the General Government to pay its debts, was held to sanction legislation, that what was owed to the Government should have priority in payment over other creditors in cases of insolvency. Look at that for a moment. The duty of the Government is to pay the debts of the Union. It must, then, have the means of raising

revenue for that purpose; it must have the power to buy, as in that case it did, a bill of exchange for the transmission of funds, and when the debtor on the bill of exchange failed, it had a right to say that the Government of the United States should be paid out of his assets before any other creditor was paid. That is the power over obligations which the Government has in collection of its debts, from the fact that, having occasion and duty to pay the debts of the Government it needs financial expedients and methods, as bills of exchange and other forms of contingent liability. It, therefore, shall have the power to assert its right over other creditors, against all legislation of the States governing these general heads of private rights.

Looking at the largeness and appropriateness of adaptation covered by that decision—appropriateness might be narrowed down to raising revenue to pay the debts, and appropriateness of adaptation might be held not to require anything more than the money in the Treasury and having it transmitted by messengers. But no; all the ordinary expedients by which this duty is to be performed of paying debts, and so of deriving the means to pay debts, admits of such general guaranteeing legislation of safety over the Government's funds, as, in the case of failure of a debtor, shall place the Government's claim on a different footing from that of the States themselves and of their citizens.

Now, who shall say that this making of the Government's promises a legal tender in the temporary services of the finance of the country, is not an appropriate means to invigorate the resources of the country in time of war? How do we judge of appropriateness in the affairs of private life, except by the conduct of men in similar situations? How do we judge of the appropriateness of a public contrivance in aid of the public finances under the immediate pressure of the necessities of war except by the conduct of other nations under similar stress? I do not argue for a power because



other nations have done it. I only argue that if this nation has appropriate and adapted means, we can determine by the experience and conduct of other nations under similar political and national conditions, what appropriate means are. Every nation under the modern system of society, for reasons which I shall point out briefly, but I think, distinctly, always has found and always will find it, in the culmination of terror and of danger that war brings to all the relations of any society involved in it, necessary to be master of the question of legal tender in private transactions, as a part of the financial system of the nation, or else legal tender in private transactions will be the master of the fate and financial resources of the Government. You must have authority somewhere; and where there is an inexorable law that the Government cannot break, that inexorable law in the private interest that controls it, is the master of the Government. Its wisdom, as I have said, is not to be considered judicially. Wisdom after an event is always wiser than wisdom during it; for it has more experience. But wisdom of action in the presence of events cannot be postponed to have the light of the upshot of it, without the expedient being resorted to, to guide you whether it should be resorted to. Wisdom does not live wholly, any more than it will die wholly, with the judiciary. Legal authority in construction on judicial criteria, as to the conduct of the Government belongs to the judiciary; but to judge over the action of government on political criteria of wisdom or rashness, of skill or clumsiness, does not belong to the courts. And if the whole experience of human affairs shows that this method has been so appropriate, that it has never failed to be resorted to when the pressure was up to the point where it came in, its appropriateness is determined and its wisdom is determined and its wisdom is with the legislature that is to act.

How is it that a Government situated as ours was on the

25th of February, 1862, in reference to its duties to lay and collect taxes, its duties to sustain the public credit, its duties to carry on the powers of war, its duties to preserve peace and strength in the loyal portions of the country, and its duty to account to this people for the trust confided to it and to it alone, impossible of execution by any other public authority, impossible of execution by the people in their primary capacity without revolution and destruction—how is it that the sober, just, rational, judicial exploration of these powers and duties will find occasion for the legislature to be of opinion that this was an appropriate resort? The argument, on our side is entitled in determining this judicial criterion to the political postulate, that the Government of the United States could not have been sustained in the judgment of the authority charged with its maintenance without a resort to this financial expedient which had been at the service of other governments and was familiar in our own past history. Otherwise you get into a discussion of the opportuneness or rashness or wisdom or circumspection on the part of Congress, never possible to become judicial questions. You must have the situation in which without this resort, the national legislature thought the Government would fall; with it, that it would be saved, and the experience we have is, that it was resorted to and that the country was saved. What would have happened by greater abstinence from this power, can only be matter of debate. Safety has been secured. The means aiding in that must now be deemed appropriate, unless plainly to be shown to have been excessive, extravagant and perverse.

At this time we had no internal taxes. On the 25th of February, 1862, we had no internal revenue provided for even for future collection, the first act having been passed July 1, 1862. At this period we had no system of paper currency at the service of and controlled by Federal legislation; for the national bank system was not brought into existence even

prospectively until an act just one year later, February 25, 1863, and the war was pressed by the rebellion with no observance of our financial system or our imperfect legislation. They did not wait to press the columns of their power upon us until they saw that we had provided legislation to meet it. They did not wait to attempt the exhaustion of our financial resources and of financial patience and subordination of our people, until we had provided an apparatus of taxation and received the inflowing treasures, or an apparatus of paper money controlled by the Federal Government and received its aid in support of the volume of currency to strengthen the Government and relieve the people. They took us as we were, without internal revenue and without paper money controlled by the Federal Government, and the question then was, How shall this Government possess itself by taxation from the people either in the form of immediate exaction or of loan? For a public loan is nothing but a discount of taxation; it is to support by a future taxation the confidence of capitalists of the country and of the world which secure the loan—how shall the Government furnish itself by taxation with means to carry on the war? Nay, how shall it furnish the people, willing, loyal, faithful, able and energetic as they, with the medium, with the faculty of paying the taxes of the Government in the immense volume that they need to be precipitately poured into the treasury? How, either in the form of the exacted tax or in the form of the anticipated tax by loan on public credit, shall this people have the medium to aid their Government? The States can do nothing for it. If the inexorable law of private right can demand the maintenance of the legal tender between man and man in gold and silver, while the Government has no power to pay gold or silver in its public transactions, and no power to exact gold and silver from the public debtor, and there be collision between this private power of compulsory exaction of debts interfering with the operations of the

Government in laying taxes, in borrowing money, in paying troops, then I submit there is presented nothing but sheer conflict between the power of the Government to accommodate this measure of private law to its necessity, and the power of the private creditor to exact the measure of his authority in defeat and prostration of the public finance and of the public safety. I know that fallacy in reasoning too well, which is satisfied with looking at the mischief of any course of procedure and which does not look at the force and effect of the evils which are to attend the opposite course of action or inaction.

Now, what are you going to do with the public finances of the country that require in some sort or shape, effectively, the means of expenditure under the exigencies imposed by a public enemy, and not measured by wisdom or duty—expenditures, as I have said, in five years, equal to the volume of our revenue for fifty years of peace at the highest measure they have reached? You have got to get that amount by taxation. Your people have got to have the means after a fashion at least, of paying it, and you have got to have it consistently with the maintenance as far as may be, of the business and the habits of the commercial people, and of the natural circulation of the resources of the country in trade and in industry, which furnish after all, the final measure and the ultimate basis of the public credit and of the public strength.

It is asked in some of the judicial opinions and is advanced in the way of argument, why resort to this method outside of direct agency and bearing upon private interests and obligations so injuriously, when the Government had power to exact the last dollar of the money of the country by taxation? Well, agreed. The Government of the country had a right to lay a tax of one hundred per cent, payable in ten days, upon all the property within its limits. An excellent faculty! And when it had been done, where would have

been the property of the country? In the hands of the citizens still or in the public treasury? It has the power of conscription, of taking all the physical strength suitable for the military service of the country into warlike array without paying a dollar. I do not think we would venture to carry it to the extent of not feeding the soldiers, but we might require them to feed themselves. And what does all that amount to? It is a faculty and a power, absurd and impossible. So, too, they say you may use your money to pay your debts. You may pay your troops in the field, a million of men, with that money, and paying them they may send it to their wives and families at home to pay the butcher and the baker; and the butcher and baker may cast their wives and families into jail because they offer them only the money that the Government has paid the soldiers, and not the gold and silver that has fled from the country in the presence and dangers of war, either for safety abroad, or hoarded in the secret coffer of the timid and the sordid. That is what may be done. And how long would it be before the soldiers, told the money is good enough for them, and yet cannot buy bread and meat with it for their families, would say, if good enough for us and not for the butcher and baker at home, we will go home and send the butcher and baker here to take it and we will have better money? They say it, not in mutiny, not in violence, but in the natural protest that no government can disregard.

If you admit that the basis of affairs in this country cannot be carried on in the transactions of public taxation and of public payments upon the measure of gold and silver, by reason of your needing to anticipate the resources of your Government and making debt at once and its securities, money of the country—if you admit that, then you must admit that the private relations of life, which furnish after all, the basis and the gauge upon which the public duties can be performed by the taxpayers, and the public obligations of

the Government ought to be measured, and must be, upon the same standard.

I have been at a loss to find in the judicial arguments of the courts below, or in those made in the briefs here, or in the oral arguments, however interesting, valuable and thorough, they have been, presented to your Honors, any substitute for this financial expedient, which instead of exacting taxes *in solido* for the whole amount at once, instead of exacting them in specie, exacted them but furnishing at the same time a promise of the Government, that whoever would supply them should be repaid, and thus turned into a loan or anticipation of taxes instead of absolute present exaction. Was specie payment continued by moneyed corporations in the United States? No. Could it be? No. A nation brought up with metallic and paper currency mixed, and placed under circumstances when the volume of its financial transactions becomes fabulous compared with all past operations of the Government, which was furnished with no system of paper money and having no immediate possible mode of establishing it except on the public credit, undertakes to distribute the pressure over the future industry of the country, by making it a loan instead of an exaction of present taxes, and to distribute it in the burden and adjustment of society to it, by making it the measure of dealing between the just and the unjust, the loyal and the disloyal, the brave and honest friends of government and the timid and cowardly deserters of duty, by saying "you shall bear this now as a loan, and it shall serve but as an arrangement of a great clearing house for all the finances of this country, private and public, until this war is over." We promise to pay the dollars that have intrinsic value, and the public faith is pledged for them, and when the public resources are adequate they shall be paid at the will of the holder. They may be digested and changed into the postponed loan having interest payable in coin, and future payment in *solido* at a

period when the Government shall be in possession by taxation, of means. In the meanwhile all this loan thus furnished you and taken from you, for that is its double character, the public credit is advanced to the taxpayers that they may use it in paying taxes; the public loan is exacted from the people by requiring them to take this money or nothing—in the meanwhile this shall be a loan to you as a whole; there shall be no power for one to have an advantage over the other, but what we under this necessity impose upon our creditors, what we thus in necessity limit our demand for from our debtors, shall be the measure of debt and credit as between you, and the final settlement shall be made by the holders with the Treasury of the United States.

Now, the mischiefs and injuries have been held up as if they were the objects of the legislation of this country. These are its objects: A government having power to exact *in solido* by present tax, all the property of the people, having power to exact *in solido* the military strength of the country without pay, subject only to the physical strength to enforce these exactions, chooses thus to administer, thus to measure, thus to moderate its processes. And this is said to be a trifling with private rights because, in the jostling of this settlement, it happens that a man gets less for his oats, or less for his farm, or less for his gold, than he would otherwise get. This disturbance of contracts in this administrative, conservative, preservative form, the best possible under the circumstances, is decried and condemned because the Government instead did not take the tax payers by the throat and exact the uttermost farthing. The Government is the creditor of the people for all that they have and are, in its hour of danger. The man who goes to fight for his country pays a debt; the man who yields his treasure to the country pays a debt; and when the nation forgives this enormous debt by reason of the infirmity or inability to pay it on the part of the debtors, unless it have patience with them until

they can pay it all, and thus deals with them in mercy, is to be restrained from withholding this debtor, thus forgiven, from going to his fellow-servant and taking him by the throat and casting him into prison until, in gold and silver, he shall pay the uttermost farthing.

I submit that that is the situation of the country; that is the obligation of the citizens; and yet because, as an incidental pressure in the wave of this great financial tide necessary to float the ship of state over the breakers, some cock-boat is crushed, it is said the power of the Government was inadequate to it, and the sacredness of contracts and obligations is thus incidentally interfered with. Why, the Government, in this hour of its stress, may separate the bridegroom from the bride at the foot of the altar, thus impairing the obligation of the sincerest contract of human society. I may beckon the son from the dying bed of his mother, thus impairing the highest obligation of nature, and trespassing upon the commandment of God we promise to obey. But it cannot say to the butcher and the baker at home, that the money which it pays to its soldiers in the field shall feed their families until the war is over.

The truth is that the argument and the invective alike deal with an incidental evil as if it was the appropriate and expected end. It mistakes the suffering of the patient under the surgeon's knife for the quivering anguish of the victim under the blade of the assassin. It mistakes the knife and cautery, that are to save, for the fire and sword that are to destroy, and asks unblushingly if a government founded on justice can compel a dealer to take less than his contract and to have it in anything but gold, even if the preservation of these peaceful and just relations when possible must yield when they become impossible.

What followed from this measure of the Government? Taxes were possible to be paid; services and supplies were possible to be obtained; and the faith of this people in their



Government did give an intrinsic value to the promise to pay in gold and silver when the Government should be able to pay. The people lying ready to meet, anxious to be marshaled to meet the terrible array found in this administration of finance, as in the military distribution of strength, their means of safety; and when they sat imploring at the gate of our temple of liberty and the Government said, "Silver and gold have I none, but such as I have, give I thee," they rose and walked and saved the country under this benign adjustment of means to ends.

The judicial opinions given in the cases with great force, with great judgment, with great plenitude, illustrate all these financial operations. It is enough for me to say the relation is obvious, the result is natural and useful, and unless you will point me to a constitution that says in so many words, "This government shall be preserved only up to the legal tender point and then it shall fall, for it is better that gold and silver should be our masters than that our constituted liberties should be maintained at the disturbance of the legal tender," I shall be justified in approving, the financial agent of the Government will be justified in administering, this subjection of the compulsory payment of debts in private contracts to the compulsory execution in war of the obligations of Government.

But, if the Court please, if it should be held that this act was without authority from the Constitution of the United States, as it stood at the time of the passage of the law, in this, that that feature of the statute providing for the issue and funding of the public debt was without authority, I submit that that defect of law can no longer be urged under the 14th amendment of the Constitution, for that has ratified every act of Congress, according to its fair intent and meaning, that has executed an issue of the public debt. The language of that clause of the 14th amendment to which I advert, states, page 20 of my brief, "The validity of the

public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned."

Now, what does that mean? We do not pass constitutional amendments to say that laws of Congress that have been passed conformably to the old Constitution shall not be questioned, because we should have to pass another amendment to say that this amendment shall not be questioned, and so forth and so forth. We pass it, according to the force of the terms used, for a questionable measure of law regarding the public debt, and say it shall not be questioned hereafter.

The supreme, the deliberate authority of the people, executing their reserved powers, if they had them, over legal tender or whatever else, looking backward and applying indemnity to the public agents and approval to the public means, says that the laws which during the stress of war, have been passed in aid and support of the public credit, shall not be questioned; they shall not be questioned in court or places or arguments or theories. Whatever you find on the law book of this nation, by its faithful servants deemed at the time needed and useful in aid of the public credit, shall inhere as an unquestionable feature in the form and effect of its securities, according to the tenor of the law. No narrow scope, no less efficient authority, will answer as the notice for which this intervention of the supreme will of the American people was asked and was rendered. I am sure I do not know, as matter of fact, in judicial or practical affairs, that there is one single point in which the debt of the United States, in the form and effect in which the legislation has issued and maintained it, has been or is questioned, except in this mere fact of the legal tender feature. Can you limit the word questioned to its political sense by the action of Congress repealing, subverting, neglecting or thwarting the

public debt? Why, if there be any element at all in what is universal, it must include the judicial question of validity in what Congress has heretofore done. We survey now the past situation; we look at the debt as it is, or look at the laws as they are and their feature, and the vigor that has been given to the public securities, and we say now in our plenary sovereignty that that debt, as read in the letter of the law, shall never be questioned.

I have but to ask the attention of the Court, not so much to the discussion, as to my abstinence from discussion, of the secondary questions involved here. They have been very ably and very ingeniously presented both by Mr. Townsend and Mr. Potter, in exhibition of the inconveniences, the incongruities and the disappointments which will grow out of this or that form of construction of the degree of efficacy that shall be given to this money in the discharge of past contracts or obligations arising substantially *ex delicto*. A great part of the criticism, ingenious and interesting, will be found after all to be but a form of that criticism we all must submit to, the imperfection of human justice; for in the very case that his honor, Judge Nelson, put of the oats bought in Canada and lost on the North River, the rule, undisturbed now by this question of medium value, as he rightly holds, is, that in the phrase of law, the invoice price is to furnish the value. Very well. I bought my oats at fifty cents in gold in Canada, and a week after without any disturbance in the currency they are worth one dollar by the rise of oats, and my oats which are worth a dollar to me are paid, by the *tortfeasor* in the collision, at fifty cents. General rules are necessary. The oats may have fallen to twenty-five cents; the *tortfeasor* instead of doing the particular justice of restoring my oats which he might do at twenty-five cents, which is the exact restoration of my situation, provided it be immediate, is obliged to pay fifty cents for oats sunk worth only twenty-five cents.

This is the imperfection of natural and human tribunals. A man trusts his jaw to a dentist and it is broken. The courts instead of giving him a new jaw, gives him so much money in his pocket. So in a variety of ways. It is but the imperfection of human justice. A great many of the cases, I am persuaded, will not stand the test of law. If I deliver a bag of gold to my clerk or porter to pay duties, and he sells it by the way, and brings, as Mr. Potter supposes, for the money, legal tender notes and pays his debt to me, that will not save him from the State prison for having embezzled my gold as he did on the way. There are a great many cases where an injudicious selection of agents for definite trusts results, in spite of all the law can do, to disappointment of confidence reposed. But all these modifications being applied and the matter reduced to what belongs to it, this same general necessity of law which I have adverted to, when this disturbing element of the measure of damages being changed does not come in, requires us to apply only the same possible completeness of justice to this disturbing element if it be a legal one.

You must give a judgment on a contract. If it be a contract sounding in debt, there is no question of evidence and none for a jury. The law then must pass upon it. It is in dollars of our currency. That contract of law will sustain a judgment only for the number of dollars claimed in it. When the law says that the metallic currency shall be met in dollars of legal tender then the judgment of the court must be so, and it would not escape injustice if it did the other and gave *de presenti* in its judgment of to-day a measure of value in paper money adequate to the gold unless it be specific performance of judgment, which it cannot do, for the specific performance of the judgment would be that it should be paid in gold, unless paper money equal in value should be tendered. If when gold is \$280, an obligation to pay a hundred dollars in gold is to result in a judgment for \$280, why the

judgment creditors can exact \$280 in greenbacks when \$100 of them are equal to his debt.

You must, therefore, have a general rule of law, and pressing that upon the Court, and insisting upon this and this alone as necessary in the public administration of the question, I say that whenever in contract a debt is liquidated in money of our currency called dollars judgment payable in legal tender according to law can be only for that amount. But when you liquidate it in judgment, not being liquidated in contract or arising from tort, and evidence is admissible either to prove what foreign money is worth or to prove what the value converted or the measure of trespass should be accounted in, then the court by the established rules of law liquidate it on the judgment of a jury finding on the fact. And that judgment is then for the first time the liquidation in dollars of the United States of the obligation, to show that it becomes a debt. All other difficulties, if your Honors please, of adjustment or interpretation as to what belongs to notes payable in commodities and how they are to be liquidated in commodities, as they are payable in commodities when they describe gold and silver dollars, are matters of private right submitted to the jurisdiction of this Court, with which the public, as now represented in this presentation of the matter, to which your Honors have done me the favor to listen, and which is submitted on their behalf, has nothing to do.

## VII

### ARGUMENT BEFORE THE INTERNATIONAL TRIBUNAL OF ARBITRATION AT GENEVA

#### NOTE

By the Treaty of Washington of May 8, 1871, all claims against Great Britain in behalf of the citizens of the United States who, during the Civil War, had suffered loss through the depredations upon the high seas of the Confederate cruisers, built, equipped and manned in the ship-yards of England, were referred to arbitration. The principal offender among these cruisers was the "Alabama" and all these claims thus arising were called generically the Alabama Claims. An important article of the treaty relating to this subject provided that the arbitrators in deciding the matter submitted to them should be guided by the following rules:

"A neutral government is bound, first, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part, within such jurisdiction to war-like use. Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

The arbitrators named pursuant to the treaty were as follows: Mr. Charles Francis Adams, United States Minister at London during the Civil War, appointed by President Grant; Sir Alexander Cockburn, Chief Justice of the Queen's Bench, appointed by Queen Victoria; Count Frederick Sclopis, an eminent Italian jurist and statesman, appointed by the King of Italy; Mr. Jacob Staempfli, a

former President of the Swiss Confederation, appointed by the President of that Government; and Baron d' Itajuba, Brazilian minister at Paris, appointed by the Emperor of Brazil.

The sessions of the tribunal were held in the "Salle des Conferences" of the ancient Hotel de Ville at Geneva, Switzerland. This room has since been called "Salle de l'Alabama," and a tablet commemorating the momentous transactions of the arbitration has been placed upon its walls.

Great Britain was represented before the tribunal by Lord Tenterden, the Agent of his Government, and by Sir Roundel Palmer, afterwards Lord Chancellor Selborne, as counsel, with whom was associated Mr. Montague Bernard. The Agent for the United States was Mr. J. C. Bancroft Davis, and the counsel, three in number, were Caleb Cushing, for many years among the foremost at the bar, Morrison R. Waite, afterwards Chief Justice of the United States Supreme Court, and Mr. Evarts.

The first meeting of the Tribunal was held December 15, 1871, when the printed cases of the two governments with the accompanying evidence were presented, the arbitrators designating the 15th of the following April as the time for presenting their respective counter cases. The final session of the Tribunal was on the 14th of September, 1872.

At the session of the Tribunal held July 25, 1872, in the language of Protocol XIV of the conference:

"On the proposal of Baron d'Itajuba, as one of the arbitrators, the Tribunal decided to require a written or printed statement or argument from the Counsel of Great Britain upon the following questions of law:

- "1. The question of due diligence, generally considered;
- "2. The special question as to the effect of the commissions of Confederate ships of war entering British ports;
- "3. The special question, as to the supplies of coal in British ports to Confederate ships; with the right to the other party to reply either orally or in writing, as the case may be."

On July 29 the printed argument of Sir Roundel Palmer, Counsel for the British Government, was filed with the arbitrators pursuant to the direction of the Tribunal, and on the 5th and 6th of August Mr. Evarts delivered the following oral argument in reply:

## ARGUMENT

FIRST DAY, AUGUST 5, 1872

In the course of the deliberations of the Tribunal, it has seemed good to the arbitrators, in pursuance of the provision of the fifth article of the Treaty of Washington, to intimate that on certain specific points they would desire a further discussion on the part of the Counsel of Her Britannic Majesty for the elucidation of those points in the consideration of the Tribunal. Under that invitation, the eminent Counsel for the British Government has presented an argument which distributes itself, as it seems to us, while dealing with the three points suggested, over a very general examination of the argument which has already been presented on the part of the United States.

In availing ourselves of the right, under the treaty, of replying to this special argument upon the points named by the Tribunal, it has been a matter of some embarrassment to determine exactly how far this discussion on our part might properly go. In one sense, our deliberate judgment is, that this new discussion has really added but little to the views or the argument which had already been presented on behalf of the British Government, and that it has not disturbed the positions which had been insisted upon, on the part of the United States, in answer to the previous discussions on the part of the British Government, contained in its case, counter-case, and argument.

But to have treated the matter in this way, and left our previous argument to be itself such an answer as we were satisfied to rely upon to the new developments of contrary views that were presented in this special argument of the British Government, would have seemed to assume too confidently in favor of our argument, that it was an adequate response in itself, and would have been not altogether respectful to the very able, very comprehensive, and very



thorough criticism upon the main points of that argument, which the eminent Counsel of Her Majesty has now presented. Nevertheless, it seems quite foreign from our duty, and quite unnecessary for any great service to the Tribunal, to pursue in detail every point and suggestion, however pertinent and however skilfully applied, that is raised in this new argument of the eminent Counsel. We shall endeavor, therefore, to present such views as seem to us useful and valuable, and as tend in their general bearing to dispose of the difficulties and counter propositions opposed to our views in the learned Counsel's present criticism upon them.

The American argument, presented on the 15th of June, as bearing upon these three points now under discussion, had distributed the subject under the general heads of the measure of international duties; of the means which Great Britain possessed for the performance of those duties; of the true scope and meaning of the phrase "due diligence," as used in the treaty; of the particular application of the duties of the treaty to the case of cruisers on their subsequent visits to British ports; and, then, of the faults, or failures, or shortcomings of Great Britain in its actual conduct of the transactions under review, in reference to these measures of duty, and this exaction of due diligence.

The special topic now raised for discussion, in the matter of "due diligence" generally considered, has been regarded by the Counsel of the British Government as involving a consideration, not only of the measure of diligence required for the discharge of ascertained duties, but also the discussion of what the measure of those duties was; and, then, of the exaction of due diligence as applicable to the different instances or occasions for the discharge of that duty, which the actual transactions in controversy between the parties disclosed. That treatment of the points is, of course, suitable enough if, in the judgment of the learned Counsel, necessary for properly meeting the question specifically under

consideration, because all those elements do bear upon the question of "due diligence" as relative to the time, and place, and circumstances that called for its exercise. Nevertheless, the general question, thus largely construed, is really equivalent to the main controversy submitted to the disposition of this Tribunal by the treaty, to wit, whether the required due diligence has been applied in the actual conduct of affairs by Great Britain to the different situations for and in which it was exacted.

The reach and effort of this special argument in behalf of the British Government, seem to us to aim at the reduction of the duties incumbent on Great Britain, the reduction of the obligation to perform those duties, in its source and in its authority, and to the calling back of the cause to the position assumed and insisted upon in the previous argument in behalf of the British Government, that this was a matter, not of international duty, and not of international obligation, and not to be judged of in the court of nations as a duty due by one nation, Great Britain, to another nation, the United States, but only as a question of its duty to itself, in the maintenance of its neutrality, and to its own laws and its own people, in exerting the means placed at the service of the Government by the Foreign Enlistment Act for controlling any efforts against the peace and dignity of the nation.

We had supposed, and have so in our argument insisted, that all that long debate was concluded by what had been settled by definitive convention between the two nations as the law of this Tribunal, upon which the conduct and duty of Great Britain, and the claims and rights of the United States, were to be adjudged, and had been distinctly expressed, and authoritatively and finally established, in the three rules of the treaty.

Before undertaking to meet the more particular inquiries that are to be disposed of in this argument, it is proper that,

at the outset, we should take notice of an attempt to disparage the efficacy of those rules, the source of their authority, and the nature of their obligation upon Great Britain. The first five sections of the special argument are devoted to this consideration. It is said that the only way that these rules come to be important in passing judgment upon the conduct of Great Britain, in the matter of the claims of the United States, is by the consent of Her Majesty that, in deciding the questions between the two countries arising out of these claims, the arbitrators should assume that, during the course of these transactions, Her Majesty's Government had undertaken to act upon the principles set forth in these rules and in them announced. That requires, it is said, as a principal consideration, that the Tribunal should determine what the law of nations on these subjects would have been if these rules had not been thus adopted. Then it is argued that, as to the propositions of duty covered by the *first* rule, the law of nations did not impose them, and that the obligation of Great Britain, therefore, in respect to the performance of the duties assigned in *that* rule, was not derived from the law of nations, was not, therefore, a duty between it and the United States, nor a duty the breach of which called for the resentments or the indemnities that belong to a violation of the law of nations. Then, it is argued that the whole duty and responsibility and obligation in that regard, on the part of Great Britain, arose under the provisions of its domestic legislation, under the provisions of the Foreign Enlistment Act, under a general obligation by which a nation, having assigned a rule of conduct for itself, is amenable for its proper and equal performance as between and towards the two belligerents. Then, it is argued that this assent of the British Government, that the Tribunal shall regard that Government as held to the performance of the duties assigned in those rules, in so far as those rules were not of antecedent obligation in the law of

nations, is not a consent that Great Britain shall be held under an international obligation to perform the rules in that regard, but simply as an agreement that they had undertaken to discharge, as a municipal obligation, under the provisions of their Foreign Enlistment Act, duties which were equivalent, in their construction of the act, to what is now assigned as an international duty; and this argument thus concludes:

When, therefore, Her Majesty's Government, by the sixth article of the Treaty of Washington, agreed that the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in the three rules (though declining to assent to them as a statement of principles of international law, which were in force at the time when the claims arose), the effect of that agreement was not to make it the duty of the arbitrators to judge retrospectively of the conduct of Her Majesty's Government, according to any false hypothesis of law or fact, but to acknowledge, as a rule of judgment for the purposes of the treaty, the undertaking which the British Government had actually, and repeatedly given to the Government of the United States, to act upon the construction which they themselves placed upon the prohibitions of their own municipal law, according to which it was coincident in substance with those rules.—British Special Argument, sec. 5.

Now we may very briefly, as we think, dispose of this suggestion, and of all the influences that it is appealed to to exert throughout the course of the discussion in aid of the views insisted upon by the learned Counsel. In the first place, it is not a correct statement of the treaty to say, that the obligation of these rules, and the responsibility on the part of Great Britain to have its conduct judged according to those rules, arise from the assent of Her Majesty thus expressed. On the contrary, that assent comes in only subsequently to the authoritative statement of the rules, and simply as a qualification attendant upon a reservation on

the part of Her Majesty, that the previous declaration shall not be esteemed as an assent *on the part of the British Government*, that those were in fact the principles of the law of nations at the time the transactions occurred.

The sixth article of the treaty thus determines the authority and the obligation of these rules. I read from the very commencement of the article:

“In deciding the matters submitted to the arbitrators they shall be governed by the following three rules which are agreed upon by the high contracting parties as rules to be taken as applicable to the case and by such principles of International Law not inconsistent therewith”; and then the rules are stated.

Now, there had been a debate between the diplomatic representatives of the two Governments, whether the duties expressed in those rules were wholly of international obligation antecedent to this agreement of the parties. The United States had from the beginning insisted that they were; Great Britain had insisted that, in regard to the outfit and equipment of an *unarmed* ship from its ports, there was only an obligation of municipal law and not of international law; that its duty concerning such outfit was wholly limited to the execution of its Foreign Enlistment Act; that the discharge of that duty and its responsibility for any default therein, could not be claimed by the United States as matter of international law, nor upon any judgment otherwise than of the general duty of a neutral to execute its laws, whatever they might be, with impartiality between the belligerents.

To close that debate, and in advance of the submission of any question to this Tribunal, the law on that subject was settled by the treaty, and settled in terms which, so far as the obligation of the law goes, seem to us to admit of no debate, and to be exposed to not the least uncertainty or doubt. But in order that it might not be an imputation

upon the Government of Great Britain, that while it presently agreed that the duties of a neutral were as these rules express them, and that these rules were applicable to this case, that a neutral nation was bound to conform to them, and that they should govern this Tribunal in its decision—in order that from all this there might not arise an imputation that the conduct of Great Britain, at the time of the transactions (if it should be found in the judgment of this Tribunal to have been at variance with these rules), would be subject to the charge of a variance with an acknowledgment of the rules then presently admitted as binding, a reservation was made. What was that reservation?

Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of these claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

Thus, while this saving clause in respect to the past conduct of Great Britain was allowed on the declaration of Her Majesty, yet that declaration was admitted into the treaty only upon the express proviso that it should have no import of any kind in disparaging the obligation of the rules, their significance, their binding force, or the principles upon which this Tribunal should judge concerning them.

Shall it be said that when the whole office of this clause, thus referred to, is of that nature and extent only, and when it ends in the determination that that reservation shall have *no effect upon your decision*, shall it, I say, be claimed that this reservation shall have an effect upon the argument?

How shall it be pretended, before a Tribunal like this, that what is to be *assumed* in the decision is not to be assumed in the argument!

But what does this mean? Does it mean that these three rules, in their future application to the conduct of the United States—nay, in their future application to the conduct of Great Britain, mean something different from what they mean in their application to the past? What becomes, then, of the purchasing consideration of these rules for the future, to wit, that, waiving debate, they shall be applied to the past?

We must therefore insist that, upon the plain declarations of this treaty, there is nothing whatever in this proposition of the first five sections of the new special argument. If there were anything in it, it would go to the rupture, almost, of the treaty; for the language is plain, the motive is declared, the force in future is not in dispute, and, for the consideration of that force in the future, the same force is to be applied in the judgment of this Tribunal upon the past. Now, it is said that this declaration of the binding authority of these rules is to read in the sense of this very complicated, somewhat unintelligible, proposition of the learned Counsel. Compare his words with the declaration of the binding authority of these rules, as Rules of International Law, actually found in the treaty, and judge for yourselves whether the two forms of expression are equivalent and interchangeable.

Can any one imagine that the United States would have agreed that the construction, in its application to the past, was to be of this modified, uncertain, optional character, while, in the future, the rules were to be authoritative, binding rules of the law of nations? When the United States had given an assent, by convention, to the law that was to govern this Tribunal, was it intended that that law should be construed, as to the past, differently from what it was to be construed in reference to the future?

I apprehend that this learned Tribunal will at once dismiss this consideration, with all its important influence upon the whole subsequent argument of the eminent Counsel, which an attentive examination of that argument will disclose.

With this proposition falls the farther proposition, already met in our former argument, that it is material to go into the region of debate as to what the law of nations upon these subjects, now under review, was or is. So far as it falls within the range covered by these rules of the treaty, their provisions have concluded the controversy. To what purpose, then, pursue an inquiry and a course of argument which, whatever way in the balance of your conclusions it may be determined, cannot affect your judgment, or your award? If these rules are found to be conformed to the law of nations in the principles which it held antecedent to their adoption, the rules cannot have for that reason any greater force than by their own simple, unconfirmed authority. If they differ from, if they exceed, if they transgress the requirements of the law of nations, as it stood antecedent to the treaty, by so much the greater force does the convention of the parties require that, for this trial and for this judgment, these rules are to be the law of this Tribunal. This argument is hinted at in the counter-case of the British Government; it has been the subject of some public discussion in the press of Great Britain. But the most authoritative expression of opinion upon this point from the press of that country, has not failed to stigmatize this suggestion as bringing the obligation of the rules of this treaty down to "the vanishing point." \*

At the close of the special argument we find a general presentation of canons for the construction of treaties, and some general observations as to the light or the controlling reason

\* "London Times," February, 1872.



under which these rules of the treaty should be construed. These suggestions may be briefly dismissed.

It certainly would be a very great reproach to these nations, which had deliberately fixed upon three propositions as expressive of the law of nations, in their judgment, for the purposes of this trial, that a resort to general instructions, for the purpose of interpretation, was necessary. Eleven canons of interpretation drawn from Vattel, are presented in order, and then several of them, as the case suits, are applied as valuable in elucidating this or that point of the rules. But the learned Counsel has omitted to bring to your notice the first and most general rule of Vattel, which, being once understood, would, as we think, dispense with any consideration of these subordinate canons which Vattel has introduced to be used only in case his first general rule does not apply. This first proposition is, that "it is not allowable to interpret what has no need of interpretation."

Now these rules of the treaty are the deliberate and careful expression of the will of the two nations in establishing the *law* for the government of this Tribunal, which the treaty calls into existence. These rules need no interpretation in any general sense. Undoubtedly there may be phrases which may receive some illustration or elucidation from the history and from the principles of the law of nations; and to that we have no objection. Instances of very proper application to that resort, occur in the argument to which I am now replying. But there can be no possible need to resort to any general rules, such as those most favored and insisted upon by the learned Counsel, viz., the sixth proposition of Vattel, that you never should accept an interpretation that leads to an absurdity,—or the tenth, that you never should accept an interpretation that leads to a crime. Nor do we need to recur to Vattel for what is certainly a most sensible proposition, that the reason of the treaty,—that is to say, the motive which led to the making

of it and the object in contemplation at the time,—is the most certain clue to lead us to the discovery of its true meaning.

But the inference drawn from that proposition, in its application to this case, by the learned Counsel, seems very wide from what to us appears natural and sensible. The aid which he seeks under the guidance of this rule, is from the abstract propositions of publicists on cognate subjects, or the illustrative instances given by legal commentators.

Our view of the matter is, that, as this treaty is applied to the past, as it is applied to an actual situation between the two nations, and as it is applied to settle the doubts and disputes which existed between them as to obligation, and to the performance of obligations, these considerations furnish the resort, if any is needed, whereby this Tribunal should seek to determine what the true meaning of the High Contracting Parties is.

Now, as bearing upon all these three topics, of due diligence, of treatment of offending cruisers in their subsequent visits to British ports, and of their supply, as from a base of operations, with the means of continuing the war, these rules are to be treated in reference to the controversy as it had arisen and as it was in progress between the two nations when the treaty was formed. What was that? Here was a nation prosecuting a war against a portion of its population and territory in revolt. Against the sovereign thus prosecuting his war, there was raised a maritime warfare. The belligerent itself thus prosecuting this maritime warfare against its sovereign, confessedly had no ports and no waters that could serve as the base of its naval operations. It had no ship-yards, it had no foundries, it had no means or resources by which it could maintain or keep on foot that war. A project and a purpose of war was all that could have origin from within its territory, and the pecuniary resources, by which it could derive its supply from neutral nations was all that it could furnish towards this maritime war.

Now, that war having in fact been kept on foot and having resulted in great injuries to the sovereign belligerent, gave occasion to a controversy between that sovereign and the neutral nation of Great Britain as to whether these actual supplies, these actual bases of maritime war from and in neutral jurisdiction, were conformable to the law of nations, or in violation of its principles. Of course, the mere fact that this war had thus been kept on foot did not, of itself, carry the neutral responsibility. But it did bring into controversy the opposing positions of the two nations. Great Britain contended during the course of the transactions, and after their close, and now here contends, that, however much to be regretted, these transactions did not place any responsibility upon the neutral, because they had been effected only by such communication of the resources of the people of Great Britain as under international law was innocent and protected; that commercial communication and the resort for asylum or hospitality in the ports was the entire measure, comprehension and character of all that had occurred within the neutral jurisdiction of Great Britain. The United States contended to the contrary.

What then was the solution of the matter which settles amicably this great dispute? Why, first, that the principles of the law of nations should be settled by convention, as they have been, and that they should furnish the guide and the control of your decision; second, that all the facts of the transactions as they occurred should be submitted to your final and satisfactory determination; and, third, that the application of these principles of law settled by convention between the parties to these facts as ascertained by yourselves should be made by yourselves, and should, in the end, close the controversy, and be accepted as satisfactory to both parties.

In this view, we must insist that there is no occasion to go into any very considerable discussion as to the meaning of

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these rules, unless in the very subordinate sense of the explanation of a phrase, such as "base of operations," or "military supplies," or "recruitment of men," or some similar matter.

I now ask your attention to the part of the discussion which relates to the effect of a "commission," which, though made the subject of the second topic named by the Tribunal, and taken in that order by the learned Counsel, I propose first to consider.

It is said that the claims of the United States in this behalf, as made in their argument, rest upon an exaggerated construction of the second clause of the first rule. On this point, I have first to say, that the construction which we put upon that clause is not exaggerated; and, in the second place, that these claims in regard to the duty of Great Britain in respect to commissioned cruisers that have had their origin in an illegal outfit in violation of the law of nations, as settled in the first rule, do not rest exclusively upon the second clause of the first rule. They, undoubtedly, in one construction of that clause, find an adequate support in its proposition; but, if that construction should fail, nevertheless, the duty of Great Britain in dealing with these offending cruisers in their subsequent resort to its ports and waters, would rest upon principles quite independent of this construction of the second clause.

The second clause of that rule is this: "And also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part within such jurisdiction to warlike use."

It is said that this second clause of the first rule manifestly applies only to the *original* departure of such a vessel from the British jurisdiction, while its purposes of unlawful hostility still remain in intention merely, and have not been evidenced by execution.

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If this means that a vessel that had made its first evasion from a British port, under circumstances which did not inculpate Great Britain for failing to arrest her, and then had come within British ports a second time, and the evidence, as then developed, would have required Great Britain to arrest her, and would have inculpated that nation for failure so to do, is not within the operation of this rule, I am at a loss to understand upon what principle of reason this pretension rests. If the meaning is that this second clause only applies to such offending vessels while they remain in the predicament of not having acquired the protection of a "commission," that pretension is a begging of the question under consideration, to wit, what the effect of a "commission" is under the circumstances proposed.

I do not understand exactly whether these two cases are meant to be covered by this criticism of the learned Counsel. But let us look at it. Supposing that the escape of the "Florida" from Liverpool, in the first instance, was not under circumstances which made it an injurious violation of neutrality for which Great Britain was responsible to the United States, that is to say, that there was no such fault, from inattention to evidence, or from delay or inefficiency of action, as made Great Britain responsible for her escape; and supposing when she entered Liverpool again, as the matter then stood in the knowledge of the Government, the evidence was clear and the duty was clear, if it were an original case; is it to be said that the duty is not as strong, that it is not as clear, and that a failure to perform it is not as clear a case for inculpation, as if in the original outset the same circumstances of failure and of fault had been apparent? Certainly the proposition cannot mean this. Certainly the conduct of Great Britain in regard to the vessel at Nassau, a British port into which she went after her escape from Liverpool, does not conform to this suggestion. But if the proposition does not come to this then it comes back to the

pretension that the commission intervening terminates the obligation, defeats the duty, and exposes the suffering belligerent to all the consequences of this naval war, illegal in its origin, illegal in its character, and, on the part of the offending belligerent, an outrage upon the neutral that has suffered it.

Now that is the very question to be determined. Unquestionably, we submit that while the first clause of the first rule is, by its terms, limited to an original equipment or outfit of an offending vessel the second clause was intended to lay down the obligation of detaining in port and of preventing the departure, of every such vessel whenever it should come within British jurisdiction. I omit from this present statement, of course, the element of the effect of the "commission," that being the immediate point in dispute.

I start in the debate of that question with this view of the scope and efficacy of the rule itself.

It is said, however, that the second clause of the first rule is to be qualified in its apparent signification and application by the supplying a phrase used in the first clause, which, it is said, must be communicated to the second. That qualifying phrase is "any vessel *which it has reasonable ground to believe* is intended," etc.

Now, this qualification is in the first clause, and it is not in the second. Of course, this element of having "reasonable ground to believe" that the offence which a neutral nation is required to prevent is about to be committed, is an element of the question of *due diligence* always fairly to be considered, always suitably to be considered in judging either of the conduct of Great Britain in these matters, or of the conduct of the United States in the past, or of the duty of both nations in the future. As an element of *due diligence*, it finds its place in the second clause of the first rule, but only as an element of *due diligence*.

Now, upon what motive does this distinction between the

purview of the first clause and of the second clause rest? Why, the duty in regard to these vessels embraced in the *first* clause applies to the inchoate and progressing enterprise at every stage of fitting out, arming or equipping, and while that enterprise is, or may be, in respect to evidence of its character, involved in obscurity, ambiguity and doubt. It is, therefore, provided that, in regard to *that* duty, only such vessels are thus subjected to interruption in the progress of construction at the responsibility of the neutral, as the neutral has "reasonable ground to believe" are intended for an unlawful purpose, which purpose the vessel itself does not necessarily disclose either in regard to its own character or of its intended use. But, after the vessel has reached *its form* and completed its structure, why then it is a sufficient limitation of the obligation and sufficient protection against undue responsibility, that "due diligence to prevent" the assigned offence is alone required. Due diligence to accomplish the required duty is all that is demanded and accordingly that distinction is preserved. It is made the clear and absolute duty of a nation to use due diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war against a power with which it is at peace, such vessel *having been* specially adapted in whole or in part within such jurisdiction to warlike use. That is, when a vessel has become ready to take the seas, having its character of warlike adaptation thus determined and thus evidenced, so upon its subsequent visit to the neutral's port, as to such a vessel, the duty to arrest her departure is limited only by the—

CHIEF JUSTICE COCKBURN: What should you think, Mr. Evarts, of such a case as this? Suppose a vessel had escaped from Great Britain with or without due diligence being observed—take the case of the "Florida" or the "Shenandoah"—take either case. She puts into a port belonging to the British Crown. You contend, if I under-

stand your argument, that she ought to be seized. But suppose the authorities at the port into which she puts are not aware of the circumstances under which the vessel originally left the shores of Great Britain. Is there an obligation to seize that vessel?"

MR. EVARTS: That, like everything else, is left as matter of fact.

THE CHIEF JUSTICE: But suppose the people at the place are perfectly unaware from whence this vessel—

MR. EVARTS: I understand the question. We are not calling in judgment the authorities at this or that place. We are calling into judgment the British nation, and if the ignorance and want of knowledge in the subordinate officials at such a port can be brought to the fault of the Home Government in not advising or keeping them informed, that is exactly the condition from which the responsibility arises. It is a question of "due diligence," or not, of the *nation* in all its conduct in providing, or not providing, for the situation, and in preparing, or not preparing, its officials to act upon suitable knowledge.

We find nothing of any limitation of this second clause of the first rule that prevents our considering its proper application to the case of a vessel, which, for the purpose of the present argument, it must be conceded ought to be arrested under it, and detained in port if the "commission" does not interpose an obstacle.

We have laid down at pages from 331 to 333, in our argument, what we consider the rules of law in regard to the effect of the "commission" of a sovereign nation, or of a belligerent not recognized as a sovereign, in the circumstances involved in this inquiry. They are very simple. I find nothing in the argument of my learned friend, careful and intelligent as it is, that disturbs these rules as rules of law. The public ship of a nation, received into the waters or ports of another nation is, by the practice of nations, as a conces-



sion to the sovereign's dignity, exempt from the jurisdiction of the courts and all judicial process of the nation whose waters it visits. This is a concession, mutual, reciprocal between nations having this kind of intercourse, and resting upon the best and surest principles of international comity. But there is no concession of extra-territoriality to the effect or extent that the *sovereign* visited is *predominated* over by the sovereign receiving hospitality to its public vessels. The principle simply is, that the treatment of the vessel rests upon considerations between the nations as sovereign, and in their political capacities, as matter to be dealt with directly between them, under reciprocal responsibility for offence on either side, and under the duty of preserving relations of peace and good will if you please, but, nevertheless, to be controlled by reasons of state.

Any construction of the rule that would allow the visiting vessel to impose its own sovereignty upon the sovereign visited, would be to push the rule to an extreme that would defeat its purpose. It is the equality of sovereigns that requires that the process and the jurisdiction of courts should not be extended to public vessels.

But all other qualifications as to how the sovereign visited shall deal with public vessels, rest in the discretion of the sovereign. If offence is committed by such vessels, or any duty arises in respect to them, he, at his discretion and under international responsibility, makes it the subject of remonstrance, makes it the subject of resentment, makes it the subject of reprisal, or makes it the subject of an immediate exercise of force, if the circumstances seem to exact it.

What, then, is the tenor of the authorities, in respect to a public vessel not of a sovereign, but of a belligerent, who has not been recognized as a sovereign? The courts of the country, when the question arises as a judicial one, turn to the political authority, and ask how that has determined the question of the public character of such vessels; and if that

question (which is a political one) has been determined in recognition of the belligerency, then the vessel of the belligerent is treated as exempt from judicial process and from the jurisdiction of the courts. But that vessel remains subject to the control, subject to the dominion of the sovereign whose ports it has visited, and it remains there under the character of a limited recognition, and not in the public character of a representative of recognized sovereignty.

We understand the motives by which belligerency is recognized while sovereignty is refused. They are the motives of humanity: they are the motives of fair play; they are the motives of neutral recognition of the actual features of the strife of violence that is in progress. But it is in vain to recognize belligerency and deny sovereignty, if you are going to attract one by one all the traits of sovereignty, in the relations with a power merely recognized as belligerent and to whom sovereignty has been denied.

What is the difference of predicament? Why, the neutral nation, when it has occasion to take offence or exercise its rights with reference to a belligerent vessel not representing a sovereign, finds no sovereign behind that vessel to which it can appeal, to which it can remonstrate, by which through diplomacy, by which through reprisals, by which in resentments, it can make itself felt, its dominion respected, and its authority obeyed. It then deals with these belligerent vessels, not unjustly, not capriciously, for injustice and caprice are wrong toward whomsoever they are exercised, but, nevertheless, upon the responsibility that its dealing must reach the conduct, and that the vessel and its conduct are the only existing power and force to which it can apply itself.

I apprehend that there is no authority from any book that disturbs in the least this proposition, or carries the respect to belligerent vessels beyond the exemption from jurisdiction of courts and judicial process. The rule of law being

of this nature, the question, then, of how a neutral shall deal with one of these cruisers that owes its existence to a violation of its neutral rights, and then presents itself for hospitality in a port of the neutral, is a question for the neutral to determine according to its duty to itself, in respect to its violated neutrality and its duty to the sovereign belligerent, who will lay to its charge the consequences and the responsibility for this offending belligerent.

Now, I find in the propositions of the eminent Counsel a clear recognition of these principles of power on the part of the sovereign, and of right on the part of the sovereign, requiring only that the power should be exercised suitably, and under circumstances which will prevent it from working oppression or unnecessary injury. That makes it a question, therefore, as to the dealing of the sovereign for which the law of nations applies no absolute rule. It then becomes a question for the Tribunal whether (under these circumstances of cruisers, that owe their origin, or their power to commit these injuries, to their violation of neutrality), Great Britain is responsible to the injured sovereign, the United States, for this breach of neutrality, for this unlawful birth, for this unlawful support of these offending cruisers. As to what the duty of a neutral nation is in these circumstances and in these relations, when the offending cruiser is again placed within its power, I find really no objection made to the peremptory course we insist upon, except that seizing such a vessel, *without previous notice*, would be impolite, would be a violation of comity, would be a violation of the decorous practice of nations, and would be so far a wrong.

Well, let us not discuss these questions in the abstract merely; let us apply the inquiry to the actual conduct of Great Britain in the actual circumstances of the career of these cruisers. If Great Britain claimed exemption from liability to the United States by saying that, when these cruisers had, confessedly, in fact escaped in violation of

neutrality, and confessedly were on the seas propagating those enormous injuries to the property and commerce of a friendly nation, it had promptly given notice that no one of them should ever after enter its ports, and that, if it did enter its ports, it would be seized and detained, then this charge that the conduct of Great Britain towards these cruisers in their subsequent visits to its ports, was such as to make it responsible for their original escape or for their subsequent career, would be met by this palliation or this defence. But no such case arises upon the proofs. You have then, on the one hand, a clear duty towards the offended belligerent, and on the other only the supposed obligation of courtesy or comity towards the offending belligerent. This courtesy, this comity, it is conceded, can be terminated at any time at the will of the neutral sovereign. But this comity or this courtesy has not been withdrawn by any notice, or by any act of Great Britain, during the entire career of these vessels.

We say then, in the first place, that there is no actual situation which calls for a consideration of this palliative defence; because the circumstances do not raise it for consideration. On the contrary, the facts as recorded show the most absolute indifference, on the part of Great Britain, to the protracted continuance of the ravages of the "Alabama" and of the "Florida," whose escape is admitted to be a scandal and a reproach to Great Britain, until the very end of the war.

And, yet, a subtraction of comity, a withdrawal of courtesy was all that was necessary to have determined their careers.

But, further, let us look a little carefully at this idea that a cruiser, illegally at sea by violation of the neutrality of the nation which has given it birth, is in a condition, on its first visit to the ports of the offended neutral, after the commission of the offence, to claim the allowance of courtesy or

comity. Can it claim courtesy or comity, by reason of anything that has proceeded from the neutral nation to encourage that expectation? On the contrary, so far from its being a cruiser that has a right to be upon the sea, and to be a claimant of hospitality, it is a cruiser, on the principles of international law (by reason of its guilty origin, and of the necessary consequences of this guilt to be visited upon the offended neutral), for whose hostile ravages the British Government is responsible. What courtesy, then, does that Government owe to a belligerent cruiser that thus practised fraud and violence upon its neutrality and exposed it to this odious responsibility? Why does the offending cruiser need notice that it will receive the treatment appropriate to its misconduct and to the interests and duty of the offended neutral? It is certainly aware of the defects of its origin, of the injury done to the neutral, and of the responsibility entailed upon the neutral for the injury to the other belligerent. We apprehend that this objection of courtesy to the guilty cruiser, that is set up as the only obstacle to the exercise of an admitted power, that this objection which maintains that a power just in itself, if executed without notice, thereby becomes an imposition and a fraud upon the offender, because no denial of hospitality has been previously announced, is an objection which leaves the ravages of such a cruiser entirely at the responsibility of the neutral which has failed to intercept it.

It is said in the special argument of the learned Counsel, that no authority can be found for this exercise of direct sovereignty on the part of an offended neutral towards a cruiser of either a recognized or an unrecognized sovereignty. But this after all comes only to this, that such an exercise of direct control over a cruiser, on the part of an offended neutral, without notice, is not according to the common course of hospitality for public vessels whether of a recognized sovereign or of a recognized belligerent. As to the right to

exercise direct authority on the part of the displeased neutral, to secure itself against insult or intrusion on the part of a cruiser that has once offended its neutrality, there is no doubt.

The argument that this direct control may be exercised by the displeased neutral without the intervention of notice, when the gravity and nature of the offence against neutrality on the part of the belligerent justify this measure of resentment and resistance, needs no instance and no authority for its support. In its nature, it is a question wholly dependent upon circumstances.

Our proposition is, that all of these cruisers drew their origin out of the violated neutrality of Great Britain, exposing that nation to accountability to the United States for their hostilities. Now, to say that a nation thus situated is required by any principles of comity to extend a notice before exercising control over the offenders brought within its power, seems to us to make justice and right, in the gravest responsibilities, yield to mere ceremonial politeness.

To meet, however, this claim on our part, it is insisted, in this special argument, that the equipment and outfit of a cruiser in a neutral port, if it goes out *unarmed* (though capable of becoming an instrument of offensive or defensive war by the mere addition of an armament), may be an *illegal* act as an offence against municipal law, but is not a violation of neutrality in the sense of being a *hostile* act, and does not place the offending cruiser in the position of having violated neutrality. That is but a recurrence to the subtle doctrine that the obligations of Great Britain in respect to the first rule of the treaty, are not, by the terms of the treaty, made *international* obligations, for the observance of which she is responsible under the law of nations, and for the permissive violation of which she is liable, as having allowed, in the sense of the law of nations a hostile act to be perpetrated on her territory.

This distinction between a merely illegal act and a hostile act, which is a violation of neutrality, is made, of course, and depends wholly, upon the distinction of the evasion of an *unarmed* ship-of-war being prohibited only by municipal law and not by the law of nations, while the evasion of an *armed* ship is prohibited by the law of nations. This is a renewal of the debate between the two nations as to what the rule of the law of nations in this respect was. But this debate was finally closed by the treaty. And, confessedly, on every principle of reason, the moment you stamp an act as a violation of neutrality, you include it in the list of acts which by the law of nations are deemed *hostile* acts. There is no act that the law of nations prohibits within the neutral jurisdiction that is not in the nature of a *hostile* act, that is not in the nature of an *act of war*, that is not in the nature of an *application by the offending belligerent of the neutral territory to the purposes of his war against the other belligerent*. The law of nations prohibits it, the law of nations punishes it, the law of nations exacts indemnity for it, only because it is a *hostile* act.

Now, suppose it were debatable before the Tribunal whether the emission of a war-ship without the addition of her armament, was a violation of the law of nations, on the same reason, and only on that reason, it would be debatable whether it were a hostile act. If it were a hostile act, it was a violation of the law of nations; if it were not a violation of the law of nations it was not so, only because it was not a hostile act. When, therefore the rules of the treaty settle that debate in favor of the construction claimed by the United States in its antecedent history and conduct, and determine that such an act *is* a violation of the law of nations, they determine that it is a hostile act. There is no escape from the general proposition that the law of nations condemns nothing done in a neutral territory unless it is done in the nature of a hostile act. And when you debate

the question whether any given act within neutral jurisdiction is or is not forbidden by the law of nations, you debate the question whether it is a hostile act or not.

Now, it is said that this outfit without the addition of an armament is not a *hostile* act under the law of nations, *antecedent* to this treaty. That is immaterial within the premises of the controversy before this Tribunal.

It is a hostile act against Great Britain, which Great Britain—

SIR ALEXANDER COCKBURN: Do I understand you, Mr. Evarts, to say that such an act is a hostile act against Great Britain?

MR. EVARTS: Yes, a hostile violation of the neutrality of Great Britain, which, if not repelled with due diligence, makes Great Britain responsible for it as a hostile act within its territory against the United States.

This argument of the eminent Counsel concedes that if an armament is added to a vessel within the neutral territory it is a hostile act within that territory, it is a hostile expedition set forth from that territory. It is therefore a violation of the law of nations, and if due diligence is not used to prevent it, it is an act for which Great Britain is responsible. If due diligence to prevent it be or be not used, it is an offence against the neutral nation by the belligerent which has consummated the act.

A neutral nation, against the rights of which such an act has been committed, to wit, the illegally fitting out a warship without armament (condemned by the law of nations as settled by this treaty), is under no obligation whatever of courtesy or comity to that cruiser. If, under such circumstances, Great Britain prefers courtesy and comity to the offending cruiser and its sponsors, rather than justice and duty to the United States, she does it upon motives which satisfy her to continue her responsibility for that cruiser rather than to terminate it. Great Britain has no authority



to exercise comity and courtesy to these cruisers at the expense of the offended belligerent, the United States, whatever her motives may be. Undoubtedly the authorities conducting the rebellion would not have looked with equal favor upon Great Britain, if she had terminated the career of these cruisers by seizing them or excluding them from her ports. That is a question between Great Britain and the belligerent that has violated her neutrality. Having the powers, having the right, the question of courtesy in giving notice was to be determined at the cost of Great Britain and not at the expense of the United States. But it ceases to be a question of courtesy when the notice has not been given at all, and when the choice has thus been made that these cruisers shall be permitted to continue their career unchecked.

Now on this question, whether the building of a vessel of this kind without the addition of armament is proscribed by the law of nations, and proscribed as a hostile act and as a violation of neutral territory (outside of the rules of the treaty) which is so much debated in this special argument, I ask attention to a few citations most of which have been already referred to in the American case.

Hautefeuille as cited upon page 170, says:

Le fait de construire un bâtiment de guerre pour le compte d'un belligérant ou de l'armer dans les états neutres est une violation du territoire. . . . Il peut également réclamer le désarmement du bâtiment illégalement armé sur son territoire et même le détenir, s'il entre dans quelque lieu soumis à sa souveraineté jusqu'à ce qu'il ait été désarmé.

Ortolan, as quoted on page 182 of the same case, passes upon this situation, which we are now discussing, as follows:

Nous nous rattacherons pour résoudre en droit des gens les difficultés que présente cette nouvelle situation, à un principe universellement établi, qui se formule en ce peu de mots "inviolabilité du territoire neutre." Cet inviolabilité est un droit pour

l'état neutre, dont le territoire ne doit pas être atteint par les faits de guerre, mais elle impose aussi à ce même état neutre une étroite obligation, celle de ne pas permettre, celle d'empêcher, activement au besoin, l'emploi de ce territoire par une des parties ou au profit de l'une des parties belligérantes dans un but hostile à l'autre partie.

And this very question, the distinction between an armed vessel and an unarmed vessel, was met by Lord Westbury, in observations made by him, and which are quoted in the American case at page 185. He said:

There was one rule of conduct which undoubtedly civilized nations had agreed to observe, and it was that the territory of a neutral should not be the base of military operations by one of two belligerents against the other. In speaking of the base of operations, he must to a certain degree differ from the noble earl [Earl Russell]. It was not a question whether armed ships had actually left our shores; but it was a question whether ships with a view to war had been built in our ports by one of two belligerents. They need not have been armed; but if they had been laid down and built with a view to warlike operations by one of two belligerents, and this was knowingly permitted to be done by a neutral power, it was unquestionably a breach of neutrality.

Chancellor Kent, in a passage cited by the learned Counsel with approval, speaking of the action of the United States as shown in the rules of President Washington's administration (which rules are also subsequently quoted with approval in this argument) says (Vol. I, p. 122):

The Government of the United States was warranted by the law and practice of nations, in the declaration made in 1793 of the rules of neutrality, which were particularly recognized as necessary to be observed by the belligerent powers, in their intercourse with this country. These rules were that *the original arming or equipping of vessels in our ports, by any of the powers at war, for military service, was unlawful; and no such vessel was entitled to an asylum in our ports.*

No vessel thus equipped was entitled to an asylum in the ports of the nation whose neutrality had been violated. The Tribunal will not fail to observe that these principles were applied by President Washington to cruisers even of an independent nation, recognized as a sovereign. It was the cruisers of France that were under consideration. But the propositions of this special argument, and the course actually pursued by Great Britain, in according its homage to their flag placed these insurgent cruisers on a much higher and more inviolable position than it is possible to concede to cruisers of a recognized sovereign. In truth, such treatment accorded to such cruisers all the irresponsibility of pirates and all the sanctity of public ships of a recognized sovereignty. It accorded the irresponsibility of pirates, because *they* were exempted from all control, and there was no government behind them to be made responsible for them, to be resorted to for their correction or restraint, and to meet the resentments of the offended neutrals in the shape of nonintercourse, of reprisals, or of war.

The action of Great Britain, under this doctrine of comity and notice as applied to the cruisers of this belligerency, really exempted them, from the beginning to the end of their careers on the ocean, from all responsibility whatever. How long could such conduct toward Great Britain in violation of her neutrality, as was practiced by this belligerent, how long could such violations of the neutrality of Great Britain have been exercised by belligerent France without remonstrance, and if that remonstrance were unheeded, without reprisals, followed finally by war? Why was not such recourse taken in respect to these cruisers, to the power behind them? There was no power behind them.

I ask, also, in this connection, attention to 1 Phillimore, pages 399 to 404, and, especially, to a passage extracted from the case of the "*Santissima Trinidad*," commenting upon the case of the "*Exchange*," which last case is cited at con-

siderable length in the argument of the eminent Counsel. Now the "Exchange" settles nothing, except that when the political authority of a government has recognized belligerency, the courts will not exercise jurisdiction over the vessels although sovereignty has not been conceded as well.

The only case in the history of our country in which the political authority was called upon to deal with a cruiser that had derived its origin in violation of our neutrality was the case of a public ship of France, the "Cassius," originally "Les Jumeaux." The legal report of this case is copied in full in the Appendix of the British case. It never came to any other determination than that France, the recognized Government of France, was the sponsor for the "Cassius," and it was on the respect shown to a sovereign as well as a public belligerent that the disposition of the case, exempting the vessel from judicial process, was made.

SIR ROUNDELL PALMER: The vessel was restored.

MR. EVARTS: But it was only after her character as a war vessel had ceased.

SIR ROUNDELL PALMER: It was the Government of the United States, by its executive power, that directed the ship to be restored.

MR. EVARTS: A detailed history of this case, legal and political, will be found in Vol. VII of the American Appendix, pages 18 to 23, in Mr. Dana's valuable note.

It will there be seen that the occasion for our Government to determine its political or executive action never arose until after the determination of the judicial proceedings and until after the vessel had been thrown up by the French Minister, who abandoned her to the United States Government, nor until after she was a worthless hulk.

SIR ROUNDELL PALMER: Am I not right in saying that the President of the Executive Government of the United States gave notice to the French Minister that the ship was at his disposal?

MR. EVARTS: After it had been abandoned, after it had ceased to be a cruiser capable of hostilities, and after the opportunity for its further hostilities had ceased.

LORD TENDERDEN: But the war still continued.

MR. EVARTS: But, I mean after the hostilities of that vessel came to an end.

And permit me to say this condition of things between the United States and France, during the administration of the first President Adams, came substantially to a war between the two countries.\*

Now, it is said that the application of this second clause of the first rule of the treaty, and this demand that detention or exclusion shall be exercised in respect to cruisers on their subsequent visits to ports, do not apply either to the "Georgia" or "Shenandoah," because neither the "Georgia" nor "Shenandoah," received their original outfit by violation of the territory of Great Britain, not even in the view of what would be such a violation taken by the United States.

\*A passage from Mr. Dana's note already referred to, puts this matter in a very clear light.

"As the 'Cassius' was taken into judicial custody, within twenty-four hours of her arrival, and remained in that custody, until after she had been disarmed and dismantled by the French Minister, and formally abandoned by him to the United States' Government with a reclamation for damages, the political department of the United States' Government never had practically before it the question, what it would do with an armed foreign vessel of war within its control which had, on a previous voyage, before it became a vessel of war, and while it was a private vessel of French citizens, added warlike equipments to itself within our ports, in violation of our statutes for the preservation of our neutrality. When it came out of judicial custody, it was a stripped, deteriorated and abandoned hulk, and was sold as such by public auction. The only political action of our government consisted in this: It refused to interfere to take the vessel from the custody of the judiciary, but instructed its attorney to see that the fact of its being a *bona fide* vessel of war be proved and brought to the attention of the court, with a motion for its discharge from arrest on the ground of its exemption as a public ship, if it turned out to be so. What course the Executive would have taken as to the vessel, if it had passed out of judicial custody before it was abandoned and dismantled, does not, of course, appear. And that is the only question of interest to international law." VII American Appendix, p. 23; *Choix de Pieces*, etc. t. 2, p. 726.

I understand that to be the position. I will not discuss the facts of the "Georgia" and "Shenandoah" any more than of any other vessel in this regard. If the "Shenandoah" and "Georgia," in the conclusions that you shall arrive at upon the facts concerning their outfit, shall be pronounced in their original evasion not to involve culpability on the part of Great Britain, and not to involve violation of Great Britain's territory on the part of either of these cruisers—

SIR ALEXANDER COCKBURN: Suppose, Mr. Evarts, that the departure was of such a nature as not to involve Great Britain in any culpability for want of due diligence, still there certainly is a violation of territory.

MR. EVARTS: That is the point I was coming to and of that I entertain no doubt.

You must find upon the facts that there was no evasion from the ports of Great Britain by either of those vessels under circumstances amounting to a violation of the neutrality of Great Britain (on the part of the vessels and on the part of those who set them forth), before you bring them into the situation where the resentment for a violation of neutrality, which I have insisted upon, was not required to be exhibited.

I am not, however, here to discuss the questions of fact.

I will take up what is made the subject of the third chapter of the special argument which has reference to coaling and "the base of naval operations" and "military supplies," as prohibited by the second rule of the treaty.

The question of "coaling" is one question considered simply under the law of *hospitality* or *asylum* to belligerent vessels in neutral ports, and quite another considered, under given facts and circumstances, as an element in the prescribed use of neutral ports as "*a base of naval operations.*"

At the outset of the discussion of this subject it is said that the British Government dealt fairly and impartially in this matter of coaling with the vessels of the two belliger-

ents, and that the real complaint on the part of the United States is of the *neutrality* which Great Britain had chosen to assume for such impartial dealing between the two belligerents. If that were our complaint it is, certainly, out of place in this controversy, for we are dealing with the conduct of Great Britain in the situation produced by the Queen's Proclamation and there is here no room for discussion of any grievance on the part of the United States from the public act of Great Britain in issuing that Proclamation. But nothing in the conduct of the argument on our part justifies this suggestion of the eminent Counsel.

On the subject of "*coaling*," it is said that it is not, of itself, a supply of contraband of war or of military aid. *Not of itself*. The grounds and occasions on which we complain of coaling, and the question of fact whether it has been fairly dealt out as between the belligerents, connect themselves with the larger subject (which is so fully discussed under this head by the eminent Counsel), a topic of discussion of which coaling is merely a branch, that is to say, the use of neutral ports and waters for coaling, victualling, repairs, supplies of sails, recruitment of men for navigation, etc. These may or may not be obnoxious to censure under the law of nations according as they have relation or not with facts and acts which, collectively, make up the use of the neutral ports and waters as "the bases of naval operations" by belligerents. Accordingly, the argument of the eminent Counsel does not stop with so easy a disposition of the subject of coaling, but proceeds to discuss the whole question of base of operations,—what it means, what it does not mean, the inconvenience of a loose extension of its meaning,—the habit of the United States in dealing with the question both in acts of Government and the practice of its cruisers,—the understanding of other nations, giving the instances arising on the correspondence with Brazil on the subject of the "Sumter"; and produces as a result of this inquiry the

conclusion, that it was not the intention of the second rule of the treaty *to limit the right of asylum*.

In regard to the special treatment of this subject of coal-ing provided by the regulations established by the British Government in 1862, it is urged that they were *voluntary* regulations, that the essence of them was that they should be fairly administered between the parties, and that the rights of asylum or hospitality in this regard should not be exceeded. Now, this brings up the whole question of the use of neutral ports or waters as a "base of naval operations" which is proscribed by the second rule of the treaty.

You will observe that while the first rule applies itself wholly to the particular subject of the illegal outfit of a *vessel* which the neutral had reasonable ground to believe was to be employed to cruise, etc., or to the detention in port of a *vessel* that was in whole or in part adapted for war—while the injunction and duty of the first rule are thus limited, and the violation of it, and the responsibility consequent upon such violation, are restricted to those narrow subjects, the proscription of the second rule is as extensive as the general subject, under the law of nations, of the use of ports and waters of the neutral as the basis of naval operations, or for the renewal or augmentation of military supplies, or the recruitment of men.

What, then, is the doctrine of hospitality or asylum, and what is the doctrine which prohibits the use (under cover of asylum, under cover of hospitality, or otherwise) of neutral ports and waters as bases of naval operations? It all rests upon the principle that, while a certain degree of protection or refuge, and a certain peaceful and innocent aid, under the stress to which maritime voyages are exposed, are not to be denied, and are not to be impeached as unlawful, yet anything that under its circumstances and in its character is the use of a port or of waters for naval operations, is proscribed, although it may take the guise, much more if it be an abuse, of the privilege of asylum or hospitality.



There is no difference in principle, in morality, or in duty, between neutrality on land and neutrality at sea. What, then, are the familiar rules of neutrality within the territory of a neutral, in respect to land warfare?

Whenever stress of the enemy, or misfortune, or cowardice, or seeking an advantage of refreshment, carries or drives one of the belligerents or any part of his forces over the frontier into the neutral territory, what is the duty of the neutral? It is to *disarm* the forces and send them into the interior till the war is over. There is to be no *practicing* with this question of neutral territory. The refugees are not compelled by the neutral to face their enemy; they are not delivered up as prisoners of war; they are not surrendered to the immediate stress of war from which they sought refuge. But from the moment that they come within neutral territory they are to become non-combatants, and they are to end their relations to the war. There are familiar examples of this in the recent history of Europe.

What is the doctrine of the law of nations in regard to *asylum*, or *refuge*, or *hospitality*, in reference to belligerents at sea during war? The words themselves sufficiently indicate it. The French equivalent of *relâche forcée* equally describes the only situation in which a neutral recognizes the right of asylum and refuge; not in the sense of shipwreck, I agree, but in the sense in which the circumstances of ordinary navigable capacity to keep the seas, for the purposes of the voyage and the maintenance of the cruise, render the resort of vessels to a port or ports suitable to, and convenient for, their navigation, under actual and *bona fide* circumstances requiring refuge and asylum.

There is another topic which needs to be adverted to before I apply the argument. I mean the distinction between *commercial* dealing in the uncombined materials of war, and the contribution of such uncombined materials of war, in the service of a belligerent, in making up military

and naval operations, by the use of neutral territory as the base of those contributions. What are really commercial transactions in contraband of war, are allowed by the practice of the United States and of England equally, and are not understood to be proscribed, *as hostile acts*, by the law of nations, and it is agreed between the two countries that the second rule is not to be extended to embrace, by any largeness of construction, mere commercial transactions in contraband of war.

SIR ALEXANDER COCKBURN: Then I understand you to concede that the private subject may deal commercially in what is contraband of war?

MR. EVARTS: I will even go further than that and say that commercial dealings or transactions are not proscribed by the law of nations, *as violations of neutral territory*, because they are in contraband of war. Therefore I do not need to seek any aid, in my present purpose, of exhibiting the transactions under the second rule by these cruisers, as using Great Britain as the base for these naval operations, from any construction of that rule which would proscribe a mere commercial dealing in what is understood to be contraband of war. Such is not the true sense of the article, nor does the law of nations proscribe this commercial dealing as a hostile act. But whenever the neutral ports, places and markets, are really used as the bases of naval operations, when the circumstances show that resort and that relation and that direct and efficient contribution and that complicity, and that origin and authorship, which exhibit the belligerent himself, drawing military supplies for the purpose of his naval operations from neutral ports, *that* is a use by a belligerent of neutral ports and waters as a base of his naval operations, and is prohibited by the second rule of the treaty. Undoubtedly the inculcation of a neutral for permitting this use, turns upon the question whether due diligence has been used to prevent it.

The argument upon the other side is, that the meaning of "the base of operations," as it has been understood in authorities relied upon by both nations, does not permit the resort to such neutral ports and waters for the purpose of specific hostile acts, but proceeds no further. The illustrative instances given by Lord Stowell, or by Chancellor Kent, in support of the rule are adduced as being the measure of the rule. These examples are of this nature: A vessel cannot make an ambush for itself in neutral waters, cannot lie at the mouth of a neutral river to sally out to seize its prey; cannot lie within neutral waters and send its boats to make captures outside their limits. All these things are proscribed. But they are given as instances, not of *flagrant*, but of *incidental* and *limited* use. They are the cases that the commentators cite to show that even casual, temporary and limited experiments of this kind are not allowed, and that they are followed by all the definite consequences of an offence to neutrality and of displeasure to a neutral, to wit, the resort by such neutral power to the necessary methods to punish and redress these violations of neutral territory.

Now, let us see how we may, by examples, contrast the asylum or hospitality in matter of coal or similar contributions in aid of navigable capacity, with the use of neutral ports as a base of naval operations.

I will not trespass upon a discussion of questions of fact. The facts are wholly within your judgment and are not embraced in the present argument. But take the coaling of the "Nashville." The "Nashville" left Charleston under circumstances not in dispute, and I am not now considering whether Great Britain is or is not responsible in reference to that ship in any other matter than that of coaling, which I will immediately introduce to your attention.

The "Nashville" having a project of a voyage from Charleston, her home port, to Great Britain, in the course of which she proposed to make such captures as might be,

intended originally to carry out Mason and Slidell, but abandoned this last intention before sailing, as exposing these Commissioners to unfavorable hazard from the blockading squadron. This was the project of her voyage, those the naval operations which she proposed to herself. How did she prepare within her own territory, to execute that project of naval warfare? She relied substantially upon steam, and in order to be sure of going over the bar, under circumstances which might give the best chance of eluding the vigilance of the blockaders, she took only two days supply of coal, which would carry her to Bermuda. The coal was exhausted when she got there: she there took in six hundred tons.

SIR ALEXANDER COCKBURN: I believe, Mr. Evarts, that the figure six afterwards came down to five.

MR. EVARTS: For the purpose of my present argument, it is quite immaterial.

MR. WAITE: It was subsequently proved to be four hundred and fifty tons.

MR. EVARTS: Very well. She had no coal and she took four hundred and fifty tons or more on board to execute the naval operation which she projected when she left Charleston and did not take the means to accomplish, but relied upon getting them in a neutral port to enable her to pursue her cruise. Now, the doctrine of *relâche forcée*, or of refuge, or of asylum, or of hospitality, has nothing to do with a transaction of that kind. The vessel comes out of a port of safety, at home, with a supply from the resources of the belligerent that will only carry it to a neutral port, to take in *there* the means of accomplishing its projected naval operations. And no system of relief in distress, or of allowing supply of the means of taking the seas for a voyage interrupted by the exhaustion of the resources originally provided, have anything to do with a case of this kind. It was a deliberate plan, when the naval operation was medi-

tated and concluded upon, *to use the neutral port as a base of naval operations*, which plan was carried out by the actual use of neutral territory as proposed.

Now we say, that if this Tribunal, upon the facts of that case, shall find that this neutral port of Bermuda was planned and used as the base of the naval operations, projected at the start of the vessel from Charleston, that *that* is the use of a neutral port as a base for naval operations. On what principle is it not? Is it true that the distance of the projected naval operation, or its continuance, makes a difference *in principle*, as to the resort to establish a base in neutral territory or to obtain supplies from such a base? Why, certainly not. Why, that would be to proscribe the slight and comparatively harmless abuses of neutral territory, and to permit the bold, impudent and permanent application of neutral territory to belligerent operations. I will not delay any further upon this illustration.

Let us take next the case of the "Shenandoah," separating it from any inquiries as to culpable escape or evasion from the original port of Liverpool. The project of the "Shenandoah's" voyage is known. It was formed within the Confederate territory. It was that the vessel should be armed and supplied—that she should make a circuit, passing round Cape Horn or the Cape of Good Hope—that she should put herself, on reaching the proper longitude, in a position to pursue her cruise to the Arctic Ocean, there to make a prey of the whaling fleet of the United States. To break up these whaling operations and destroy the fleet, was planned under motives and for advantages which seemed to that belligerent to justify the expense, and risk, and perils of the undertaking. That is the naval operation, and all that was done *inside the belligerent territory*, was to form the project of the naval operation and to communicate authority to execute it to the officers who were outside of that territory.

Now, either the "Shenandoah," if she was to be obtained,

prepared, armed, furnished, and coaled for that extensive naval operation, was to have no base for it at all, or it was to find a base for it in neutral ports. It is not a phantom ship, and it must have a base. Accordingly, as matter of fact, all that went to make up the execution of that operation of maritime war, was derived from the neutral ports of Great Britain. The ship was thence delivered and sallied forth—

SIR ALEXANDER COCKBURN: But that was not known to the Government.

MR. EVARTS: I am now only showing that this occurred as *matter of fact*. The question whether it was known to, or permitted by, the Government of Great Britain, as the Chief Justice suggests, is of an entirely different aspect, involving the considerations of due diligence to prevent.

The ship, then, was furnished from neutral ports and waters. It resorted to Madeira to await the arrival of the "Laurel," which, by concert and employment in advance of the sailing of the "Shenandoah," was to take the armament, munitions of war, officers and a part of the crew to complete the "Shenandoah's" fitness to take the seas as a ship of war to execute the naval project on which she originally sailed, and which were transferred from ship to ship at sea. The island of Madeira served only as rendezvous for the two vessels and if there had been occasion, as in fact there was not, might have furnished shelter from storms. Thus made a fighting ship from these neutral ports, as a base, and furnished from the same base with the complete material for the naval operation projected, the "Shenandoah" made captures, as without interruption of her main project she might, rounded the Cape of Good Hope and came to Melbourne, another British port, whence she was to take her last departure for her distant field of operations, the waters of the whaling fleet of the United States in the Arctic Ocean.

SIR ROUNDELL PALMER: I did not, Mr. Evarts, enter upon a treatment of each of the vessels.

MR. EVARTS: I am only showing that this ship did use your ports for the purposes of its operations.

SIR ROUNDELL PALMER: But, Mr. Evarts, I only mentioned these vessels.

MR. EVARTS: You discussed the question of base of naval operations.

There she obtained as matter of fact four hundred and fifty tons of coal, or something of that kind, and forty men, and without both of these, as well as important repairs of her machinery, she could not have carried out the naval project on which she had started. The coal taken at Melbourne was sent by appointment from Liverpool, and was there to complete her refitment. The naval operation would have failed if the vessel had not received the replenishment of power and resources at Melbourne as a base. Now, this "Shenandoah" was able to sail sixteen knots an hour.

SIR ALEXANDER COCKBURN: Do you mean to say sixteen knots an hour? That is faster than any vessel I have ever heard of.

MR. EVARTS: Well, we will not dispute about the facts. There is no doubt, however, that it is so,—she sailed on one occasion over three hundred and twenty miles in twenty-four hours.

LORD TENTERDEN: But that is not sixteen knots an hour.

MR. EVARTS: I have not said that she had sailed twenty-four consecutive hours at the rate of sixteen knots. But she *could* sail sixteen knots an hour, and she could only steam ten knots an hour. I have not invented this. Her remarkable qualities are stated in the proofs. Her steam power was not necessary to her navigation or her speed, however, except to provide against calms, and give assurance of constancy of progress in adverse weather. Her great advantage, however, was in being one of the fastest sailing ships ever built. The great importance of her having abundance of coal at the contemplated scene of her naval operations

was, that she might capture these poor whalers, who understood those perilous seas, and if they could only get up steerage way, would be able to elude her.

SIR ALEXANDER COCKBURN: What! if she sailed sixteen knots an hour!

MR. EVARTS: If the Chief Justice will mark the circumstances of Arctic navigation, he will understand that by means of their knowledge of the ice, and the region generally, they could seek shelter by interposing barriers between themselves and their pursuer. They did, however, become her prey; but it was only when she found them becalmed. Now, this case of the "Shenandoah" illustrates, by its career, on a large scale, the project of a belligerent in maritime war, which sets forth a vessel and furnishes it complete for war, plans its naval operations and executes them, and all this *from neutral ports and waters, as the only base, and as a sufficient base*. Melbourne was the only port from which the "Shenandoah" received anything after its first supply from the home ports of Great Britain, and it finally accomplished the main operation of its naval warfare by means of the *coal-ing*, and other refitment at Melbourne. Whether it could rely for the origin of its naval power, and for the means of accomplishing its naval warfare, upon the use of neutral ports and waters, under the cover of commercial dealings in contraband of war, and under the cover of the privilege of asylum, was the question which it proposed to itself and which it answered for itself. It is under the application of these principles that the case of the "Shenandoah" is supposed to be protected from being a violation of the law of nations, which prohibits the use of ports and waters of a neutral as a base of naval operations. I do not propose to argue upon the facts of the case of the "Shenandoah," but only to submit the *principles* on which they are to be considered.

SIR ALEXANDER COCKBURN: I would like to ask you, Mr. Evarts, whether your proposition involves this: that



every time a belligerent steam-vessel puts into a neutral port for the purpose of getting coal, and then goes forward upon her further object of war, that there is a violation of neutral territory. I just want to draw your attention to this point. What I want to understand is, what difference there is between the ships of one nation and the ships of another nation, as regards this matter of coal. Would the principle of your argument apply to the vessels of other belligerents?

MR. EVARTS: Of course, it is to be applied to all belligerents, and when the case arises for complaint it is to be judged in view of all the facts and circumstances, whether it falls within the license of hospitality, or whether it is a resort as to a base of operations, that is to say, whether the whole transaction, in all its features amounts to a concerted and planned use.

SIR ALEXANDER COCKBURN: Planned by whom?

MR. EVARTS: Why, planned by the belligerent.

SIR ALEXANDER COCKBURN: A ship goes into a neutral port without intimating its purpose or disclosing whether it belongs to one belligerent or another.

MR. EVARTS: Take the case of the "Nashville."

LORD TENTERDEN: Take the "Vanderbilt."

SIR ALEXANDER COCKBURN: Well, let us take that case. She goes into a neutral port and wants coal for the purpose of going forth again on her mission of war. No question is asked. The ship, I grant you, comes with the object of getting coal for the purpose of going out on her errand of war, and, in one sense, uses neutral territory as a base. But the neutral knows nothing about the course of the vessel, or its destination, except he takes it for granted it is a ship of war. How can he be said to *allow* the territory to be made a base of operations, except so far as it applies to the ships of a belligerent?

MR. EVARTS: It does apply; but I have not said that this alone rendered the *neutral responsible*. I have merely laid

down the facts. The magnitude of the operations and the completeness of their relations to the base of supplies, do not alter the application of principles. After all there is left, of course, the question of whether *you have suffered or allowed* these things, or *have used due diligence to prevent* them, and upon the discussion of that subject I shall not trespass.

SIR ALEXANDER COCKBURN: But that is the very question.

MR. EVARTS: But *that* question could not arise until it was determined whether the belligerent had, *as matter of fact*, made the neutral port a base of operations. All that I have said has been intended to show that what was done by these cruisers did make the neutral ports a base, just as much as if a shallop was stationed at the mouth of a neutral river, and sent out a boat to commit hostilities: In either case, the neutral is not responsible, unless it has failed to exercise due diligence. But there is this further consequence carrying responsibility, that when the neutral does not know of such an act until after it has been committed, it is its duty to resent it and to prevent its repetition, and to deny hospitality to the vessels that have consummated it. Now, these questions can certainly be kept distinct. If the fact is not known, and if there is no want of due diligence, then the neutral is not in fault. If the facts are afterwards known, then the cruiser that has committed the violation of neutrality is to be proscribed, to be denied hospitality, to be detained in port, or excluded from port, after notice, or without notice, as the case may be.

The question then arises whether a nation, thus dealt with by a belligerent, and having the power to stop the course of naval operations thus based, if it purposely omits so to do, does not make itself responsible for their continuance. I do not desire to be drawn into a discussion upon the facts which is not included in the range of the present argument. I, now, am simply endeavouring to show that the *illustra-*

tions of Kent and Stowell taken from navigation, and maritime war, then prevailing, do not furnish the *rule* or the *limit* of the responsibility of neutrals in respect of allowing such use of naval bases, nor of the circumstances which make up the prohibited uses of neutral ports for such bases.

I proceed to another branch of the subject.\*

It is said that the concerted setting forth of the "Laurel" from the neutral port, to carry the armament and the munitions of war and the officers and the crew to be combined outside the neutral jurisdiction with the "Shenandoah," already issued from another port of the same neutral, is only a *dealing in contraband of war*. I deny that such a transaction has any connection with dealing in contraband of war. It is a direct obtaining by a projected cruiser of its supply of armament, munitions and men and officers from a neutral port.

There may be no fault on the part of the neutral in not preventing it. That will depend on the question of "due diligence to prevent," "reasonable ground to believe," etc. But the principle of contraband of war does not protect such a transaction, and *that* is the only principle that has been appealed to by the British Government, in the discussions of this matter to justify it. The facts of this vessel going out were known,—

SIR ALEXANDER COCKBURN: Not until afterwards.

MR. EVARTS: The law of nations was violated, your territory had been used, as matter of fact, we claim, as the base

\* In connection with this discussion, I ask attention to the course taken by the Government of Brazil in resentment and punishment for the incidental violation of its neutrality by the "Florida" (within the neutral waters) and by the "Shenandoah," by her commander violating the Consular seal of Brazil on board one of the "Shenandoah's" prizes. In both instances, the offending cruisers were perpetually excluded from the ports of the empire; and the exclusion embraced any other cruiser that should be commanded by the captain of the "Shenandoah."

The treatment of the "Rappahannock" by the French Government, which detained her in port till the close of the war, is well worthy of attention. The transaction is detailed in the App. Am. Counter-Case, pp. 917-946.

of naval operations, and it was not a dealing in contraband of war. It was not a commercial transaction. It was a direct furnishing of a cruiser with armament from your port. It might as well have been accomplished within three miles of your coast. Yet, it is said this is no offence against your law.

SIR ALEXANDER COCKBURN: I do not say that.

MR. EVARTS: Unfortunately for the United States, through the whole war, we had quite other doctrine from those who laid down the law for Great Britain in these matters. Fortunately, we have better doctrine here and now. But according to the law as administered in England such combinations of the materials of naval war could be made outside of her ports, by the direct action of the belligerent Government, deriving all the materials from her ports and planning thus to combine them outside.

SIR ALEXANDER COCKBURN: If that had been shown.

MR. EVARTS: The proofs do show it, and that the doctrine was, that it was lawful and should not be interfered with.

I disclaim any desire or purpose of arguing upon the facts of particular vessels. I am merely laying down principles applicable to supposed facts. If the principles were conceded, I would have no occasion to deal with questions of fact at all.

The learned Chief Justice has, very satisfactorily, certainly, to us, presently expressed certain legal opinions on this subject; but I must say that they were not entertained by the Government of Great Britain, and did not control its action.

I think that the proofs before the Tribunal can be easily referred to, to confirm the position I have taken, as to the legal doctrine held in England in reference to this subject of the base of operations. In contradiction of that doctrine, we now insist, as our Government all through the war in-

sisted, this is not dealing in contraband of war; it is using neutral territory as a base of operations. Whether there was, or should be, no responsibility for it, because it was not known or could not be prevented, is an entirely different question. But I undertake to say as matter of fact, that the doctrine of the English law, during all those proceedings, was, that such projects and their execution as a contributory concurrence with the outfit of the principal cruisers for naval operations (such cases as those of the "Laurel," the "Alar," the "Agrippina," the "Bahama" and similar vessels) were *lawful* and could not and should not be prevented.

SIR ALEXANDER COCKBURN: I would be very much obliged if you will refer me to some authority for that.

MR. EVARTS: I will. One of the arbitrators (Mr. Adams) from his knowledge of the course of the correspondence, knows that I do not deceive myself in that respect. It is this contributory furnishing of armament, and munitions, and men, which rendered the principal cruisers efficient instruments of all the mischief, and without which their evasions from port were of little consequence, and, without the expectation of which, they never would have been planned.

I now refer to a paper that will show that I have been right in my proposition as to the construction of English law as held during the occurrence of these transactions.

In Vol. III of American Appendix (p. 53), in a report to the Board of Trade by the Commissioners of Customs, occurs this passage:

CUSTOM HOUSE, September 25, 1862.

Your lordships having, by Mr. Arbuthnot's letter of the 16th instant, transmitted to us, with reference to Mr. Hamilton's letter of the 2d ultimo, the enclosed communication from the Foreign Office, with copies of a further letter and its enclosures from the United States Minister at this Court, respecting the supply of cannon and munitions of war to the gunboat No. 290,

recently built at Liverpool, and now in the service of the so-called Confederate States of America; and your lordships having desired that we would take such steps as might seem to be required in view of the facts therein represented, and report the result to your lordships, we have now to report:

That, assuming the statement set forth in the affidavit of Reddin (who sailed from Liverpool in the vessel) which accompanied Mr. Adams's letter to Earl Russell, to be correct, the furnishing of arms, etc., to the gun-boat does not appear to have taken place in any part of the United Kingdom or of her Majesty's dominions, but in or near Angra Bay, part of the Azores, part of the Portuguese dominions. No offence, therefore, cognizable by the laws of this country, appears to have been committed by the parties engaged in the transaction alluded to in the affidavit.

From Lord Russell's communication of this report to the American Minister, it will be seen that the accepted opinion of the Government was that such operations could not be interfered with, and therefore would not be interfered with. That may be a correct view of the Foreign Enlistment Act of Great Britain, and, hence, the importance of reducing the obligations of a neutral nation to prevent violations of international law to some settled meaning.

This was done by convention between the High Contracting Parties and appears in the rules of the treaty. Under these rules is to be maintained the inculcation which we bring against Great Britain, and which I have now discussed because the subject is treated in the special argument to which I am replying. The instances of neutral default announced under the second rule, are made penal by the law of nations. They are proscribed by the second rule. They are not protected as dealings in contraband of war. They are not protected under the right of asylum. They are uses of neutral ports and waters as bases of naval operations, and if not prohibited by the Foreign Enlistment Act, and if the British Executive Government could not and would not prevent them, and that was the limit of their duty under

their Foreign Enlistment Act, still we come *here* for judgment, whether a nation is not responsible that deals thus in the contribution of military supplies, that suffers ship after ship to go on these errands, makes no effort to stop them, but, on the contrary, announces, as the result of the deliberation of the law officers, to the subordinate officials, to the Minister of the United States, to all the world, that these things are *not* prohibited by the law of Great Britain, and cannot be prohibited by the Executive Government, and, therefore, cannot and will not be stopped. That this was the doctrine of the English Government will be seen from a letter dated the 2d of April, 1863, of Lord Russell, found, in part, in Vol. II, American Appendix, page 404; and, in part, in Vol. I, *ibid.*, page 590:

But the question really is, has there been any act done in England both contrary to the obligations of neutrality as recognized by Great Britain and the United States, *and capable of being made the subject of a criminal prosecution?* I can only repeat that, in the opinion of Her Majesty's Government, no such act is specified in the papers which you have submitted to me.

\* \* \* \* \*

I, however, willingly assure you that, in view of the statements contained in the intercepted correspondence, Her Majesty's Government have *renewed* the instructions already given to the custom-house authorities of the several British ports where ships of war may be constructed, and by the Secretary of State for the Home Department to various authorities with whom he is in communication, to endeavor to discover and obtain legal evidence of any violation of the Foreign Enlistment Act, with a view to the strict enforcement of that statute whenever it can really be shown to be infringed.

\* \* \* \* \*

It seems clear, on the principle enunciated in these authorities, that, except on the ground of any proved violation of the Foreign Enlistment Act, Her Majesty's Government cannot interfere with commercial dealings between British subjects and the so-styled

Confederate States, whether the subject of those dealings be money or contraband goods, or even ships adapted for warlike purposes.

These were instances in which complaints were made of these transactions, and in which it was answered that the British Government charged itself with no duty of due diligence, with no duty of remonstrance, with no duty of prevention or denunciation, but simply with municipal prosecutions for crimes against the Foreign Enlistment Act.

What I have said of the "Shenandoah," distinguished her from the "Florida," and the "Alabama," and the "Georgia," only in the fact that, from the beginning to the end of the "Shenandoah's" career, she had *no* port of any kind, and had *no* base of any kind, except the ports of the single nation of Great Britain. But as to the "Florida" and the "Alabama," one (the "Alabama") was supplied by a tug, or steamer, that took out her armament to Angra Bay, the place of her first resort; the other (the "Florida") was supplied by a vessel sent out to Nassau to meet her, carrying all her armament and munitions of war, and which she took out in tow, transshipping her freight of war material outside the line of neutral waters.

That is called dealing in contraband, not proscribed by the law of nations, not proscribed by any municipal law, and not involving any duty of Great Britain to intercept, to discourage or denounce it. That is confounding substance with form. But let me use the language of an Attorney-General of England, employed in the Parliamentary discussions which attended the enactment of the Foreign Enlistment Act of 1819.

From this debate in Parliament, it will be seen what the principal law adviser of the Crown *then* thought of carrying on war by *commercial transactions*. He said:

Such an enactment was required by every principle of justice; for when the State says, "We will have nothing to do with the war waged between two separate powers," and the subjects in opposi-



tion to it say, "We will, however, interfere in it," surely the House would see the necessity of enacting some penal statutes to prevent them from doing so; unless, indeed it was to be contended, that the State and the subjects who composed that State, might take distinct and opposite sides in the quarrel. He should now allude to the petitions which had that evening been presented to the House against the bill; and here he could not but observe, that they had either totally misunderstood or else totally misrepresented its intended object. They had stated that it was calculated to check the commercial transactions and to injure the commercial interests of this country. If by the words "commercial interests and commercial transactions" were meant "warlike adventures," he allowed that it would; but if it were intended to argue that it would diminish a fair and legal and pacific commerce, he must enter his protest against any such doctrines. Now, he maintained, *that as war was actually carried on against Spain by what the petitioners called "commercial transactions," it was the duty of the House to check and injure them as speedily as possible.* (Note B, American Argument, p. 508; Fr. tr. Appendice, p. 488.)

War against the United States, maritime war, was carried on under cover of what was called right of asylum and commercial transactions in contraband of war. We are now under the law of nations, by virtue of this second rule, which says that the use of "ports and waters as the base of naval operations, or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men" shall not be allowed, and if the *facts* of such dealing shall be found, and the proof of due diligence to prevent them shall not appear in the proofs, under that second rule all four of these cruisers must be condemned by the Tribunal.

I do not pass, nor venture to pass, in the present argument, upon the question whether there has been in this matter a lack of due diligence. In the discussion of my learned friend every one of these instances is regarded as a case not within the second rule, and as a simple dealing in contraband of war.

SIR ROUNDELL PALMER: I must be permitted to say that I have not felt myself at liberty to go into a discussion of individual cases.

MR. EVARTS: The vessels are treated in the argument of the learned Counsel.

SIR ROUNDELL PALMER: There may be passages in reference to some of the principal topics which have been mentioned, but I have avoided entering upon any elaborate consideration of each particular vessel. There is no distinct enumeration of the vessels.

MR. EVARTS: There is, so distinct as this; it is expressly stated that under the law neither the "Georgia," nor the "Shenandoah," nor the subsidiary vessels that carried their armaments to the "Georgia" and "Shenandoah," and to the "Florida" and "Alabama," had, in so doing, committed a breach of neutrality.

I am arguing now under the second rule. I have not felt that I was transcending the proper limits of this debate, because, in answer to the special argument of the eminent Counsel, I have argued in this way. My own view as to the extension of the argument of the learned Counsel in his discussion of what is called "due diligence," as a doctrine of the law of nations, would not have inclined me to expect so large a field of discussion as he covered. But, as I have admitted in my introductory remarks, the question of due diligence connects itself with the measure of duty and the manner in which it was performed, and I felt no difficulty in thinking that the line could not be very distinctly drawn.

I have undertaken to argue this question under a state of facts, which shows that a whole naval project is supplied, from the first outfit of the cruiser to the final end of the cruise, by means of this sort of connection with neutral ports and waters as a base of naval operations; and I have insisted that such naval operations are not excluded from the proscription of the second rule, by what is claimed in the argu-

ment of the learned Counsel, as the doctrine of contraband of war and the doctrine of asylum.

SECOND DAY, AUGUST 6, 1872

I was upon the point of the doctrine of the British Government, and its action under that doctrine, as bearing upon the outfit of the contributory provisions of armament, munitions, and men, set forth in such vessels as the "Bahama," the "Alar," and the "Laurel." The correspondence is full of evidence that I was correct in my statement of the doctrine of the British Government, and of its action from beginning to end being controlled by that doctrine; and all the remonstrances of the United States were met by the answer that the law of nations, the Foreign Enlistment Act, the duty of neutrality, had nothing whatever to do with that subject, as it was simply dealing in contraband of war. The importance of this view, of course, and its immense influence in producing the present controversy between the two nations, are obvious. The whole mischief was wrought by the co-operating force of the two legal propositions: (1) that the *unarmed* cruiser was not itself a weapon of war, an instrument of war, and, therefore, was not to be intercepted as committing a violation of the law of nations; and (2) that the contributory provision by means of her supply ships, of her armament, munitions, and men, to make her a complete instrument of naval hostilities, was also not a violation of the law of nations, but simply a commercial dealing in contraband. It was only under those combined doctrines that the cruiser ever came to be in the position of an instrument of offensive and defensive war, and to be able to assume the "commission" prepared for her, and which was *thenceforth* to protect her from interference on the doctrine of comity to sovereignty.

So, too, it will be found, when we come to consider the observations of the eminent Counsel on the subject of due

diligence, to which I shall have occasion soon to reply, that the question whether these were *hostile acts*, under the law of nations, was the turning point in the doctrine of the Government of Great Britain, and of its action, as to whether it would intercept these enterprises by the exercise of executive power, as a neutral government would intercept anything in the nature of a hostile act under the law of nations. The doctrine was that these were not hostile acts *separately*, and that no hostile act arose unless these separate contributions were combined in the ports of Great Britain; that there was no footing otherwise for the obligation of the law of nations to establish itself upon; that there was no remissness of duty on the part of the neutral in respect of them; and finally that these operations were not violations of the Foreign Enlistment Act. All this is shown by the whole correspondence, and by the decisions of the municipal courts of England, in regard to the only question passed upon at all, that of *unarmed* vessels, so far as they ever passed even upon that question.

It has seemed to be intimated by observations which the learned Counsel has done me the honor to make during my present consideration of this topic, that my argument has transcended the proper limit of reply to the special argument which the eminent Counsel himself has made on the same topic. A reference to the text of that argument will, I think, set this question at rest.

In the fifteenth section of the first chapter of his argument, he does us the honor to quote certain observations in our principal argument to which he proposes to reply. He quotes, at page 17 of his argument, as follows:

(2) The next great failure of Great Britain "to use due diligence to prevent" the violation of its neutrality, in the matters within the jurisdiction of the Tribunal, is shown in its entire omission to exert the direct executive authority, lodged in the Royal Prerogative, to intercept the preparations and outfits of the offend-

ing vessels, and the contributory provisions, of armament, munitions and men, which were emitted from various ports of the United Kingdom.

We do not find in the British case or counter-case, any serious contention, but that such powers as pertain to the prerogative, in the maintenance of international relations, and are exercised as such by other great powers, would have prevented the escape of every one of the offending vessels emitted from British ports, and precluded the subsidiary aids of warlike equipment and supplies which set them forth, and kept them on foot, for the maritime hostilities which they maintained.

The comment of the learned Counsel upon this passage is found on the same page (17) of his argument, as follows:

With respect to the second passage, it is to be observed, that it not only imputes as a want of due diligence, the abstinence from the use of arbitrary power to supply a supposed deficiency of legal powers, but it assumes that the United States had a right, by international law, to request Great Britain to prevent the exportation from her territory of what it describes as "contributory provisions," arms, munitions, and "subsidiary aids of warlike equipment and supplies," though such elements of armament were uncombined, and were not destined to be combined, within British jurisdiction, but were exported from that territory under the conditions of ordinary exports of articles contraband of war. For such a pretension no warrant can be found, either in international law, or in any municipal law of Great Britain, or in any one of the three rules contained in the sixth article of the treaty of Washington.

I respectfully submit, therefore, that in the observations I have had the honor to make upon this subject, I can hardly be said to have exceeded the due limits of an argument in reply. I fail to find in what the eminent Counsel here advances in behalf of his Government, any answer to my assertion that, during the whole course of the war (a period when he, as Solicitor General or as Attorney General of England, was one of the law advisers of the Government),

the action of Great Britain was governed by the doctrine which I have stated. This was publicly announced and it was so understood by the rebel agents, by the interests involved in these maritime hostilities, by the United States Minister, by the officials of the British Government, by everybody who had to act, or ask for action, in the premises.

The first instance arising was of the vessel that carried out the armament and munitions for the "Alabama," and the answer was as I read from the report of the Commissioners of Customs to the Board of Trade. This official paper stated that the commissioners found nothing in that affair that touched the obligations of Great Britain. This was communicated to Mr. Adams, and that, thenceforth, was the doctrine and action of the Government of Great Britain.

The view of an eminent publicist on this point, as a question of international law, may be seen from an extract found at page 177 of the case of the United States. M. Rolin-Jacquemyns says:

*Il nous semble que l'adoption d'une pareille proposition équivaudrait à l'inclination d'un moyen facile d'éluder la règle qui déclare incompatible avec la neutralité d'un pays l'organisation, sur son territoire d'expéditions militaires au service d'un des belligérants. Il suffira, s'il s'agit d'une entreprise maritime, de faire partir en deux ou trois fois les éléments qui la constituent; d'abord le vaisseau, puis les hommes, puis les armes, et si tous ces éléments ne se rejoignent que hors des eaux de la puissance neutre qui les a laissés partir, la neutralité sera intacte. Nous pensons que cette interprétation de la loi internationale n'est ni raisonnable, ni équitable.*

It will be, then, for the Tribunal to decide what the law of nations is on this subject. If the Tribunal shall assent to the principles which I have insisted upon, and shall find them to be embraced within the provisions of the three rules of this treaty, and that the facts in the case require the application of these principles, it stands admitted that

Great Britain has not used and has refused to use any means whatever for the interruption of these contributory provisions of armament and munitions to the offending cruisers.

It is not for me to dispute the ruling of the eminent lawyers of Great Britain upon their Foreign Enlistment Act; but, for the life of me, I cannot see why the "Alar" and the "Bahama" and the "Laurel," when they sailed from the ports of England with no cargo whatever except the armament and munitions of war of one of these cruisers, and with no errand and no employment except that of the Rebel Government, through its agents, to transport these armaments and munitions to the cruisers which awaited them, were not "transports" in the service of one of the belligerents within the meaning of the Foreign Enlistment Act of Great Britain. That, however, is a question of municipal law. It is with international law that we are dealing now and here. The whole argument to escape the consequences which international law visits upon the neutral for its infractions, has been, that whatever was blameworthy was so only as an infraction of the municipal law of Great Britain. And when you come to transactions of the kind I am now discussing, as they were not deemed violations of the Foreign Enlistment Act nor of international law, and as the powers of the Government by force to intercept, through the exercise of prerogative, or otherwise, did not come into play, the argument is that there were *no consequences whatever* to result from these transactions. They were merely considered as commercial transactions in contraband of war.

But the moment it is held that these things *were* forbidden by the law of nations, then of course it is no answer to say, you cannot indict anybody for them under the law of Great Britain. Nor does the law of nations, having laid down a duty and established its violation as a crime, furnish no means of redressing the injury or of correcting or punishing the evil. What course does it sanction when neutral terri-

tory is violated by taking prizes within it? When the prize comes within the jurisdiction of the neutral, he is authorized to take it from the offending belligerent by force and release it. What course does it sanction when a cruiser has been armed within neutral territory? When the vessel comes within the jurisdiction of the neutral, he is authorized to disarm it.

Now, our proposition is that these cruisers, thus deriving their force for war by these outfits of tenders with their armament and munitions and men, when brought within the British jurisdiction, should have been *disarmed* because they had been armed, in the sense of the law of nations, by using as a base of their maritime hostilities, or their maritime fitting for hostilities, the ports and waters of this neutral state.

Why, what would be thought of a cruiser of the United States lying off the port of Liverpool, or the port of Ushant in France, and awaiting there the arrival of a tender coming from Liverpool, or from Southampton, by pre-arrangement, with an augmentation of her battery and the supply of her fighting crew? Would it, because the vessel had not entered the port of Southampton or the port of Liverpool, be less a violation of the law of nations which prohibited the augmentation of the force of a fighting vessel of any belligerent from the contributions of the ports of the neutral?

The fourth chapter of this special argument is occupied, as I have already suggested, with the consideration of the true interpretation of the rules of the treaty, under general canons of criticism, and under the light which should be thrown upon their interpretation by the doctrines and practices of nations. I respectfully submit, however, that the only really useful instruction that should be sought, or can be applied, in aid of your interpretation of these rules, if their interpretation needs any aid, is to be drawn from the situation of the parties, and the elements of the controversy



between them, for the settlement and composition of which these rules were framed; and this Tribunal was created to investigate the facts and to apply the rules to them in its award.

The whole ground of this controversy is expressed in the firmest and most distinct manner by the statesmen, on both sides, who had charge of the negotiations between the two countries, and who could not misunderstand what were the situation and the field of debate for application to which the High Contracting Parties framed these rules. And what were they? Why, primarily, it was this very question of the various forms of contributory aid from the neutral ports and waters of Great Britain, by which the Confederate navy had been made, by which it was armed, by which it was supplied, by which it was kept on foot, by which, without any base within the belligerent territory, it maintained a maritime war.

Anterior to the negotiation which produced the treaty, there is this public declaration made by Mr. Gladstone, and cited on page 215 of the case of the United States, "There is no doubt that Jefferson Davis and other leaders of the South have made an army; *they are making*, it appears, *a navy*."

There is the speech of Lord Russell on the 26th of April 1864, also cited on the same page: "It has been usual for a power carrying on war upon the seas, to possess ports of its own in which vessels are built, equipped, and fitted, and from which they issue, to which they bring<sup>7</sup> their prizes, and in which those prizes, when brought before a court, are either condemned or restored. But it so happens that in this conflict, the Confederate States have no ports except those of the Mersey and of the Clyde, from which they fit out ships to cruise against the Federals; and having no ports to which to bring their prizes, they are obliged to burn them on the high seas." There is, furthermore, the declaration

of Mr. Fish, made as Secretary of State, in his celebrated despatch of the 25th of September, 1869, in which he distinctly proposes to the British Government, in regard to the claim of the United States in this controversy, that the rebel counsels have made Great Britain "the arsenal, the navy-yard, and the treasury of the insurgent Confederates."

*That* was the controversy between the two countries, for the solution of which the rules of this treaty and the deliberations of this Tribunal were to be called into action; and they are intended to cover, and do cover, *all the forms* in which this use of Great Britain for the means and the opportunities of keeping on foot these maritime hostilities was practised. The first rule covers all questions of the outfit of the cruisers themselves; the second rule covers all the means by which the neutral ports and waters of Great Britain were used as bases for the rebel maritime operations of these cruisers, and for the provision, the renewal or the augmentation of their force of armament, munitions, and men. Both nations so agreed. The eminent Counsel for the British Government, in the special argument to which I am now replying, also agrees that the *second* rule, under which the present discussion arises, is conformed to the pre-existing law of nations.

We find, however, in this chapter of the special argument, another introduction of the *retroactive effect*, as it is called, of these Rules, as a reason why their interpretation should be different from what might otherwise be insisted upon. This is but a reappearance of what I have already exposed as a vice in the argument, viz., that these rules, in respect to the very subject for which they were framed, do not mean the same thing as they are to mean hereafter, when new situations arise for their application. Special methods of criticism, artificial limits of application are resorted to, to disparage or distort them, as binding and authoritative rules, in regard to the past conduct of Great Britain. Why,

you might as well tear the treaty in pieces, as to introduce and insist upon any proposition, whether of interpretation or of application, which results in the demand that the very controversy for which they were framed is not really to be governed by the rules of the treaty.

The concluding observation of this chapter that the invitation to other powers to adopt these rules as binding upon them, contained in the treaty, should discourage a forced and exaggerated construction of them, I assent to; not so much upon the motive suggested, as upon the principle that a forced and exaggerated construction should not be resorted to, upon either side, upon any motive whatever.

I now come to the more general chapter in the argument of the learned Counsel, the *first* chapter, which presents under forty-three sections, a very extensive and very comprehensive, and, certainly, a very able criticism upon the main argument of the United States upon "due diligence," and upon the duties in regard to which due diligence was required and in regard to the means for the performance of those duties and the application of this due diligence, possessed by Great Britain. Certainly, these form a very material portion of the argument of the United States; and that argument, as I have said, has been subjected to a very extensive criticism. Referring the Tribunal to our argument itself as furnishing, at least, what we suppose to be a clear and intelligible view of our propositions, of the grounds upon which they rest, of the reasoning which supports them, of the authorities which sustain them, of their applicability and of the result which they lead to—the inculpation of Great Britain in the matters now under judgment, we shall yet think it right to pass under review a few of the general topics which are considered in this discussion of "due diligence."

The sections from 7 to 16 (the earlier sections having been already considered) are occupied with a discussion of

what are supposed to be the views of the American argument on the subject of prerogative or executive power, as distinguished from the ordinary administration of authority through the instrumentality of courts of justice and their procedure. Although we may not pretend to have as accurate views of constitutional questions pertaining to the nation of Great Britain, or to the general principles of her common law, or of the effect of her statutory regulations and of her judicial decisions as the eminent Counsel of her Britannic Majesty, yet I think it will be found that the criticisms upon our argument in these respects are not, by any means, sound. It is, of course, a matter of the least possible consequence to us, in any position which we occupy, either as a nation before this Tribunal or as lawyers in our argument, whether or not the sum of the obligations of Great Britain in this behalf under the law of nations was referred for its execution to this or that authority under its constitution, or to this or that official action under its administration. One object of our argument has been to show that, if the sum of these obligations was not performed, it was a matter of but little importance to us, or to this Tribunal, *where*, in the distribution of administrative duty, or *where*, in the constitutional disposition of authority, the defect, either of power, or in the due exercise of power, was found to be the guilty cause of the result. Yet, strangely enough, when, in a certain section of our argument, *that* is laid down as one proposition, we are accused by the learned Counsel of a *petitio principii*, of begging the question, that the sum of her obligations was not performed by Great Britain.

With regard to *prerogative* the learned counsel seems to think that the existence of the supposed executive powers under the British Constitution, and which our argument has assigned to the prerogative of the Crown, savors of arbitrary or despotic power. We have no occasion to go

into the history of the prerogative of the British Crown, or to consider through what modifications it has reached its present condition. When a free nation like Great Britain, assigns certain functions to be executed by the Crown there does not seem to be any danger to its liberties from that distribution of authority, when we remember that Parliament has full power to arrange, modify, or curtail the prerogative at its pleasure, and when every instrument of the Crown, in the exercise of the prerogative, is subject to impeachment for its abuse.

The prerogative is trusted under the British constitution with all the international intercourse of peace and war, with all the duties and responsibilities of changing peace to war, or war to peace, and also in regard to all the international obligations and responsibilities which grow out of a declared or actual situation of neutrality when hostilities are pending between other nations. Of that general proposition there seems to be no dispute. But it is alleged that there is a strange confusion of ideas in our minds and in our argument, in not drawing the distinction between what is thus properly ascribable to extra territoriality or *ad extra* administration, what deals with outward relations and what has to do with persons and property within the kingdom. This prerogative, it is insisted, gives no power over persons and property within the kingdom of Great Britain, and it is further insisted that the Foreign Enlistment Act was the whole measure of the authority of the Government, and the whole measure therefore of its duty, *within the kingdom*. It is said the Government had no power by prerogative to make that a crime in the kingdom which is not a crime by the law, or of punishing a crime in any other manner than through the courts of justice. This of course is sound, as well as familiar, law. But the interesting question is, whether the *nation* is supplied with adequate legislation, if that is to furnish the only means for the exercise of international duty.

If it is not so supplied, that is a fault as between the two nations; if it is so supplied, and the powers are not properly exercised, that is equally a fault as between the two nations. The course of the American argument is to show that, either on the one or the other of the horns of this dilemma, the actual conduct of the British Government must be impaled.

We are instructed in this special argument as to what, in the opinion of the eminent Counsel, belongs to prerogative, and what to judicial action under the statute; but we find no limitation of what is in the power of Parliament, or in the power of administration, if adequate parliamentary provision be made for its exercise. But all this course of argument, ingenious, subtle and intricate as it is, finally brings the eminent Counsel around to this point, that by the common law of England *within the realm*, there is power in the Crown to use all the executive authority of the nation, civil and military, to prevent a *hostile act* towards another nation within that territory. That is but another name for prerogative, there is no statute on that subject, and no writ from any Court can issue to accomplish that object.

If this is undoubtedly part of the common law of England, as the learned Counsel states, the argument here turns upon nothing else but the old controversy between us, whether these acts were in the nature of *hostile acts*, under the condemnation of the law of nations as such, that ought to have been intercepted by the exercise of prerogative, or by the power of the Crown at common law, whichever you choose to call it. The object of all the discussion of the learned Counsel is continually to bring it back to the point that within the kingdom of Great Britain, the Foreign Enlistment Act was the sole authority for action and prevention, and if these vessels were reasonably proceeded against, under the requirements of administrative duty in enforcing the Foreign Enlistment Act, as against persons and property for confiscation or for punishment, that was all that was necessary or proper.

SIR ALEXANDER COCKBURN: Am I to understand you as a lawyer to say that it was competent for the authorities at the port whence such a vessel escaped to order out troops and command them to fire?

MR. EVARTS: That will depend upon the question whether that was the only way to compel her to an observance.

SIR ALEXANDER COCKBURN: I put the question to you in the concrete.

MR. EVARTS: That would draw me to another subject, viz., a discussion of the facts. But I will say that it depends upon whether the act she is engaged in committing comes within the category of *hostile acts*.

SIR ALEXANDER COCKBURN: But taking this case, and laying aside the question of due diligence. The vessel is going out of the Mersey. Do you say as a lawyer that she should be fired upon?

MR. EVARTS: Under proper circumstances, yes.

SIR ALEXANDER COCKBURN: But I put the circumstances.

MR. EVARTS: You must give me the attending circumstances that show such an act of force is necessary to secure the execution of the public authority. You do not put in the element that that is the only way to bring such a vessel to. If you add that element, then I say yes.

SIR ALEXANDER COCKBURN: She is going out of the port. They know she is trying to escape from the port. Do you, I again ask—do you, as a lawyer, say that it would be competent for the authorities without a warrant, simply because this is a violation of the law, to fire on that vessel?

MR. EVARTS: Certainly, after the usual preliminaries of hailing her, and firing across her bows, to bring her to. Finally, if she insists on proceeding on her way, and thus raises the issue of escape from the Government, or forcible arrest by the Government, you are to fire into her. It

becomes a question whether the Government is to surrender to the ship, or the ship to the Government. Of course, the *lawfulness* of this action depends upon the question whether the act committed is, under the law of nations, *a violation of the neutrality of the territory, and a hostile act*, as it is conceded throughout this argument, the evasion of an *armed* ship would be.

In section sixteen of this argument you will find the statement of the learned Counsel on this subject of the executive powers of the British Government in this behalf:

It is impossible too pointedly to deny the truth of this assumption, or too pointedly to state that, if any military or naval expeditions, or any other acts or operations of war, against the United States, in the true and proper sense of these words, had been attempted within British territory, it would not have been necessary for the British Government, either to suspend the Habeas Corpus Act, or to rely on the Foreign Enlistment Act, in order to enable it to intercept and prevent by force such expeditions, or such acts or operations of war. The whole civil police, and the whole naval and military forces of the British Crown, would have been lawfully available to the Executive Government, *by the common law of the realm*, for the prevention of such proceedings.

This is the law of England as understood by the eminent Counsel who has presented this argument. Given the facts that make the evasion from the port of Liverpool of the vessel proposed, a violation of the law of nations,—because it is a hostile act against the United States, and exposes Great Britain to responsibility for the violation of neutrality,—then, the situation has arisen, in the failure of civil means, the failure of remonstrance, of arrest and of bringing to, for firing into the vessel. For certainly, if we have authority to stop, we are not to have that authority met and frustrated by the persistence of violent resistance to it.

It certainly makes very little difference to us whether this authority of the executive to use all its forces for the actual prevention of the occurrence of these hostile transactions



within the realm, is lodged in what he calls the common law of Great Britain, or is found, as we suppose, in the prerogative of the Crown. Nor do I understand this argument, throughout, to quarrel with the proposition that an *armed* ship that should undertake to proceed out of the port of Liverpool, would be exposed to the exercise of that power; and, of course, if the proper circumstances arose, even to the extent to which it has been pushed in answer to the questions put to me by one of the members of the Tribunal. For, if the Queen is to use all her power to prevent a hostile act, and if an armed vessel is, in its evasion of a port, committing a hostile act, that power can be exerted to the point of firing into such vessel, if necessary, as well as of merely exerting the slightest touch, if that proves sufficient to accomplish the object.\*

\* It would seem to be quite in accordance with the ordinary course of Governments in dealing with armed (or merchant) ships, that refuse obedience to a peaceful summons of sovereignty to submit to its authority, to enforce that summons by firing into the contumacious ship.

In "Phillimore," Vol. III, pp. 231-234, will be found the orders of the British Government in the matter of the "Terceira Expedition," and an account of their execution. Captain Walpole "fired two shots, to bring them to, but they continued their course. The vessel, on board of which was Saldanha, although now within point blank range of the 'Ranger's' guns, seemed determined to push in at all hazards. *To prevent him from effecting his object*, Captain Walpole was under the necessity of firing a shot at the vessel, which killed one man and wounded another." P. 232.

The eighth article of the Brazilian Circular of June 23, 1863, provides for the necessary exhibition of force, as follows:

"8. Finally, force shall be used (and in the absence or insufficiency of this, a solemn and earnest protest shall be made) against a belligerent who, on being notified and warned, *does not desist from the violation of the neutrality of the Empire*. Forts and vessels of war shall be ordered to fire on a belligerent, who shall," etc.—7 Am. App., p. 113.

Indeed, there is no alternative, unless the solution of the difficulty laid down by Dogberry is preferred:

"Dogberry. You are to bid any man stand in the prince's name.

"Watch. How if he will not stand?

"Dogberry. Why, then, take no note of him, but let him go; and presently call the rest of the watch together, and thank God you are rid of a knave." Shakespear, Much Ado about Nothing, Act III, section 3.

Sections 17 to 25 are occupied with a discussion concerning the *preventive* powers and *punitive* powers under the legislation of Great Britain as compared with that of the United States. While there is here a denial that the British Government ever put itself upon a necessary confinement to the *punitive* powers of that act, or that that act contains no *preventive* power, or that it contains not so much as the act of the United States, still, after all, I find no progress made beyond this: that the preventive powers, thus relied upon and thus asserted, as having origin under, and by virtue of, the act, are confined to the prevention that springs out of the *ability to punish*, or out of the *mode* in which the power to punish is exercised.

Nor will the text of the Foreign Enlistment Act furnish any evidence that it provides any power for the *prevention* by law of the evasion of such a vessel, except in the form of prosecution for *confiscation*, which is one of the modes of punishment. And when this Foreign Enlistment Act was passed in 1819, it was thus left unaccompanied by any executive power of interception and prevention, for the reason, as shown in the debates, that this interceptive and preventive power resided in the prerogative of the Crown, and could be exercised by it. This will be seen from the debates which we have appended in Note B to our argument.

In comparing that law with the preceding act passed in 1818 by the American Government, the debates in Parliament gave as the reason for the lodgment of this preventive power in the Executive of the United States, by the act of Congress, and for its not being necessary to lodge a similar preventive power in the British Crown, that there was no prerogative in America, while there was in Great Britain.

To be sure, when one of the punishments provided by law is a proceeding *in rem* for confiscation of the vessel, if you serve your process at a time and under circumstances to prevent a departure of the vessel on its illegal errand, you

do effect a detention. But that is all. The trouble with that detention is, that it is only a detention of process, to bring to issue and trial a question of private right, a confiscation of the ship, which is to be governed by all the rules of law and evidence, which are attendant upon the exercise of authority by the Crown, in taking away the property of the subject.

It never was of any practical importance to the United States, whether the British Government confiscated a ship or imprisoned the malefactors, except so far as this might indicate the feelings and sympathy of that nation. All we wished was, that the Government should *prevent* these vessels from going out. It was not a question with us, whether they punished this or that man, or insisted upon this or that confiscation, *provided* the interception of the cruisers was effected. When, therefore, we claimed under the Foreign Enlistment Act or otherwise, that these vessels should be seized and detained, one of the forms of punitive recourse under that act would have operated a detention, *if applied at the proper time and under the proper circumstances*. Confiscation had its place whenever the vessel was in the power of the Government; but it was only by interception of the *enterprise* that we were to be benefited. That interception, by some means or other, we had a right to; and if your law, if your constitution, had so arranged matters that it could not be had, except upon the ordinary process, the ordinary motives, the ordinary evidence, and the ordinary duty by which confiscation of private property was obtained, and that provision was not adequate to our rights, then our argument is that your law needed improvement.

But it is said that nothing in the conduct of Great Britain, of practical importance to the United States, turned upon the question whether the British law, the Foreign Enlistment Act, was applicable only to an *armed* vessel, or was applicable to a vessel that should go out merely prepared to

take its armament. How is it that nothing turned upon that question? It is so said because, as the learned Counsel contends, the Government adopted the construction that the statute did embrace the case of a vessel unarmed. But take the case of the "Alabama," or the "Florida," for an illustration, and see how this pretension is justified by the facts. What occasioned the debates of administrative officers? What raised the difficulties and doubts of custom house and other officials, except that the vessel was *not* armed, when as regards both of these vessels the Executive Government had given orders that they should be watched? Watched! watched, indeed! as they were until they went out. They were put under the eye of a watching supervision, to have it known whether an armament went on board, in order that *then* they might be reported, and, it may be, intercepted. The whole administrative question of the practical application of authority by the British Government, in our aid, for the *interception* of these vessels, turned upon the circumstance of whether the vessel was armed or was not armed. Under the administration of that question, they went out without armaments, not wishing to be stopped, and, by pre-arrangement, took their armaments from tenders that subsequently brought them, which, also, could not be stopped.

Certain observations of Baron Bramwell are quoted by the learned Counsel in this connection, which are useful to us as illustrating the turning point in the question as to armed and unarmed vessels. They are to this effect, and exhibit the British doctrine:

A vessel fitted to receive her armament *and* armed, is a vessel that should be stopped under an international duty. This amounts to an act of proximate hostility which a neutral is bound to arrest. Baron Bramwell held that the emission of a vessel *armed* is, undoubtedly, a hostile expedition within the meaning of the law of nations. But a vessel

fitted to receive her armament in the neutral port, and sent out of that port by the belligerent only in that condition, he held is not an enterprise in violation of the law of nations, and is not a hostile expedition in the sense of that law. By consequence, Baron Bramwell argued, nothing in such an enterprise of a belligerent from a neutral port calls for the exercise of authority on the part of the neutral, either by law or by executive interference, and, until the armament gets on board, there is nothing to bring the case within the province of *international* proscription and of *international* responsibility. It was then, he argues, only a question for Great Britain whether the provisions of the Foreign Enlistment Act can touch such a vessel, and the only question for the British Government was as towards the United States, have they done their duty to themselves in the enforcement of the municipal law, which involves a question of international responsibility to the United States? We insist, therefore, that so far from nothing practical turning upon this distinction, all the doubts and difficulties turn upon it, especially in connection with the ancillary proposition that these vessels could be provided, by means of their tenders, with armaments, without any accountability for the complete hostile expedition.\*

It is said that we can draw no argument as to the deficiency of their old act, from the improved provisions of the new act of 1870. Why not? When we say that your act of 1819 was not adequate to the situation, and that, if you

\* Mr. Theodore Ortolan, in a late edition of his "Diplomatie de la Mer," tome II, says:

"Nous nous rattacherons, pour résoudre en droit des gens les difficultés que présente cette nouvelle situation, à un principe universellement établi, qui se formule en ce peu des mots: 'Inviolabilité du territoire neutre.' Cette inviolabilité est un droit pour l'état neutre, dont le territoire ne doit pas être atteint par les faits de guerre, mais elle impose aussi à ce même état neutre une étroite obligation, celle de ne pas permettre, celle d'empêcher, activement au besoin, l'emploi de ce territoire par l'une des parties ou au profit de l'une des parties belligérantes, dans un but hostile à l'autre partie." *Case of the U. S.*, p. 182.

had no prerogative to supply its defects, you should have supplied them by act of Parliament,—that you should have furnished by legislation the means for the performance of a duty which required you to prevent the commission of the acts which we complain of—it is certainly competent for us to resort to the fact that, when our war was over, from *thenceforth*, movements were made towards the amendment of your law, and that, when the late war on the continent of Europe opened, your new Act was immediately passed containing all the present provisions of practical executive interception of such illegal enterprises—it is, I say, competent for us to refer to all this as a strong, as well as fair argument, to show that, even in the opinion of the British Parliament, the old Act was not adequate to the performance of the *international* duties of Great Britain to the United States.

Sections 27 to 30 of the special argument are occupied with a discussion of that part of our argument which alleges, as want of due diligence, the entire failure of Great Britain to have an active, effective, and spontaneous investigation, scrutiny, report and interceptive prevention of enterprises of this kind. Well, the comments upon this are of two kinds: first concerning the question, under a somewhat prolonged discussion of facts, whether the Government did or did not do this, that, or the other thing;\* and, then, concerning the more general question, as to whether the rules of this treaty call upon this Tribunal to inquire into any such deficiency

\* It does not seem profitable to go into a minute examination of the proofs before the Tribunal to establish the propositions of our argument specially controverted in section 29 and 30 of the present argument of the eminent Counsel. Although the letter of Earl Russell, quoted by the learned Counsel, does, incidentally, refer to certain instructions having been given to subordinate officials, yet we look in vain, through the proofs of the British Government, for the text or date or circulation of these instructions. As for the rest, we find nothing in the instances cited, in which specific information happened to be given in regard to this or that vessel or enterprise, which contravenes our general propositions of fact, in this behalf, or the inference of want of due diligence on the part of the British Government, which we have drawn from those facts.

of diligence which was not applicable to the case of a vessel respecting which the British Government "had reasonable ground to believe" that a violation of the law was meditated.

Our answer to this latter question is, that the Rules together, in their true construction, require the application of due diligence (particularly under the special emphasis of the third rule), "to prevent" the occurrence of any of the infractions of the law of nations proscribed by the rules.

There are two propositions in these rules. Certain things are assigned as violations of the law of nations, and as involving a duty on the part of a neutral Government to prevent them; and besides in and towards preventing them it is its duty to use due diligence. In regard to every class of alleged infractions of these rules, there comes to be an inquiry, first, whether in the circumstances and facts which are assigned, the alleged infractions are a violation of any of the *duties* under the law of nations as prescribed by those rules. If not, they are dismissed from your consideration. But if they are so found, then these rules, by their own vigor, become applicable to the situation, and then comes the inquiry whether Great Britain did, in fact, use due diligence to prevent the proscribed infractions. It is under the sections now under review, that the learned Counsel suggests whether it is supposed that this general requirement of the use of due diligence by Great Britain is intended to cover the cases of vessels like the "Shenandoah" and the "Georgia" (which, it is alleged the British Government had no reasonable ground to believe were meditating or preparing an evasion of the laws or a violation of the duties of Great Britain); or the cases of these tenders, that supplied the "Georgia," and the "Shenandoah," and the "Florida," and the "Alabama," with their armaments and munitions of war—it is under these sections that this discussion arises. The answer on our part to this suggestion is, that the general means of

diligence to keep the Government informed of facts and enable it to judge whether there was "reasonable ground to believe" in any given case, and thus enable it *to be prepared* to intercept the illegal enterprise, are required in cases that the rules proscribe as infractions of neutrality.

I will agree that under the first clause of the first rule the duty is applied to a vessel concerning which the Government "shall have reasonable ground to believe," etc. Under the second clause of the first rule, this phrase is omitted, and the question of "reasonable ground to believe" forms only an element in the more general question of "due diligence." Under the second Rule also, the whole subject of the use of the neutral ports and waters as a base of naval operations, is open; and, if there has been a defect of diligence in providing the officers of Great Britain with the means of knowledge and the means of action, to prevent such use of its ports and waters as a base of operations, why, *then*, Great Britain is at fault in not having used due diligence to prevent such use of its ports and waters. That is our argument; and it seems to us, it is a sound argument. It is very strange, if it is not, and if the duty of a government to use due diligence to prevent its ports and waters from being used as a base of naval operations, does not include the use of due diligence to ascertain whether they were being, or were to be, so used.

It was a fault not to use due diligence to prevent the ports and waters of Great Britain from being used as a base of naval operations, or for the augmentation of force, or the recruitment of men. And to admit that it was a fault, in any case, not to act where the Government had cause to believe that there was to be a violation of law, and yet to claim that it was no fault for the Government to be guilty of negligence in not procuring intelligence and information which might give a reasonable ground to believe, seems to me absurd.



This, indeed, would be to stamp the *lesser* negligence, of not applying due diligence in a particular case when there was "reasonable ground to believe," as a *fault*, entailing responsibility upon a neutral Government, and to excuse the same Government for the systematic want of due diligence which, through indifference to duty and voluntary ignorance, did not allow itself to be placed in a position to judge whether the ground of belief was reasonable, or whether there was any ground at all for its action. The lesser fault infers that the same or greater responsibility, is imputable to the greater fault.

The sections of the special argument of the learned Counsel, which are occupied with a comparison between the practical efficiency of the American and of the English Acts, and in which the propositions of our argument, in this regard, are questioned and commented upon, will be replied to by my learned associate, Mr. Cushing, in an argument which he will present to the Tribunal. It is enough for me to repeat here, the observation of our argument, that the true measure of the vigor of an act is its judicial interpretation and its practical execution. We do not intend to allow ourselves to be involved in discussions as to the *propriety* of this or that construction of the English act which reduced its power. The question with us is, what were the practical interpretation and exercise of the powers of that act, as compared with the practical interpretation and exercise of the powers of the Neutrality Act of the United States?

The propositions of our argument seem to us untouched by any of the criticisms which the learned Counsel has applied to them. We, rightly or wrongly, have interpreted our act, from its first enactment to the present time, as giving authority to the Executive of the United States, to intercept by direct exercise of power, all these prohibited enterprises at any stage at which he can lay his hands upon them, for the purpose of *their prevention*. The correspondence pro-

duced in our proofs, showing the action of the Executive Government on all the occasions in which this statute has been required to be enforced, will indicate that, whether it has been successful or not in the execution of the duty, the Government has recognized the duty, the Executive has undertaken it, and all the subordinates have had their attention called to it, in the sense and to the end of *prevention*. All subordinates have, as well, always been stimulated to the duty of keeping the Executive, from time to time, fully and promptly supplied with information to secure the efficient execution of the law: And it is not improper, perhaps, for me here to observe, that my learned associate, Mr. Cushing, and myself, having been called upon to execute this statute in the office of Attorney General of the United States, we can bear testimony to its vigor and its efficiency, in the every day action of the Government. It is submitted to and not questioned, and produces its effect. Whether the Government of the United States, possessing that power under and by authority of the statute, has always been successful or not, or has always used due diligence in its exercise, and whether it is accountable to this or that nation for a faulty execution of its duties of neutrality, are questions which this Tribunal cannot dispose of, and they are only remotely collateral to any discussions properly before the arbitrators.

SIR ALEXANDER COCKBURN: If you are arguing now upon that point, Mr. Evarts, explain this to me. By the last English Act of 1870, the Secretary of State has power, under certain circumstances, to order a vessel to be seized, and then it is provided that the owner of such vessel may make claim, etc., which the Court shall as soon as possible consider. I want to ask you, what, under your act of 1818, which gives power to the President to seize, under similar circumstances, would be the course of proceedings in such a case? How would the owner be able to know whether his

vessel was one liable to seizure and confiscation? How would he get his vessel back again according to your form of procedure?

MR. EVARTS: I take it for granted that the detention which the President might authorize, or cause to be made, would not be an indefinite detention. By the terms of the act, however, that exercise of the executive power is not, necessarily, terminated by a judicial appeal of any kind.

SIR ALEXANDER COCKBURN: Do you mean to say that the ship shall remain in the hands of the Government?

MR. EVARTS: If the party chooses so to leave it without satisfactory explanation. The President interposes in the discharge of a public duty, to prevent the commission of an act in violation of neutrality, which he believes to be illegal. On representation to him by the aggrieved party, he will release the vessel, if he finds reason. If he does not so release, then the vessel remains subject to the continued exercise of executive control, under the same motives that first induced it.

SIR ALEXANDER COCKBURN: Would not the President, in the ordinary practice of things, direct that the matter should be submitted to judicial determination?

MR. EVARTS: This Executive interception carries no confiscation. It merely detains the vessel and the owner can apply for its release, giving an explanation of the matter. But the Executive may say, "I am not satisfied with your explanation; if you have nothing else to say, I will keep your vessel"; or he may send it to the Courts to enforce its confiscation.

SIR ALEXANDER COCKBURN: Which does he practically do?

MR. EVARTS: He practically, when not satisfied to release it, usually sends it to the Court, because the situation admits of that disposition of it. Under the act of the United States, there is the same actual interception by the Executive which your act of 1870—

SIR ALEXANDER COCKBURN: Under our act the Executive has no discretion; it must send it to the courts."

MR. EVARTS: Under our act, we trust the Executive for a proper exercise of the official authority entrusted to him.

In the American case, some instances of the exercise of this power on a very considerable scale, will be found. (Page 126 of the French translation.) The documents explaining these transactions are collected at length in the Appendix to the American counter-case.

Sections 38 to 41 of the special argument call in question our position as to *onus probandi*. It is said, that we improperly undertake to shift, generally, the burden of proof, and require Great Britain to discharge itself from liability by affirmative proof, in all cases where we charge that the act done is within the obligation of the three rules. This criticism is enforced by reference to a case arising in the public action of the United States under the treaty of 1794 with Great Britain.

I will spend but few words here. The propositions of our argument are easily understood upon that point. They come to this: that, whenever the United States, by its proofs, have brought the case in hand to this stage, that the acts which are complained of, the action and the result which have arisen from it, are violations of the requirements of the law of nations as laid down in the three rules, and this action has taken place within the jurisdiction of Great Britain (so that the principal fact of accountability within the nation is established), *then*, on the ordinary principle that the affirmative is to be taken up by that party which needs its exercise, the proof of "due diligence" is to be supplied by Great Britain. How is a foreigner, outside of the Government, uninformed of its conduct, having no access to its deliberations or the movements of the Government, to supply the proof of the *want* of due diligence? We repose, then, upon the ordinary principles of forensic and judicial

reasoning. When the act complained of is at the fault of the *nation*, having been done within its jurisdiction, and is a violation of the law of nations for which there is an accountability provided by these three rules, the point of determination whether due diligence has been exercised by the authorities of the country to prevent it, or it has happened in spite of the exercise of due diligence—the burden of the proof of “due diligence” is upon the party charged with its exercise.

Let us look at the case of the “Elizabeth,” which is quoted in section 41. It is a long quotation and I will read, therefore, only, the concluding part. It will be found on page 50 of the French translation of the special argument. The question was as to the burden of proof under the obligation that had been assumed by the United States:

The promise was conditional. We will restore in all those cases of complaint where it shall be established by sufficient testimony that the facts are true which form the basis of our promise—that is, that the property claimed belongs to British subjects; that it was taken either within the line of jurisdictional protection or, if on the high seas, then by some vessel illegally armed in our ports; and that the property so taken has been brought within our ports. By whom were these facts to be proved? According to every principle of reason, justice, or equity, it belongs to him who claims the benefit of a promise to prove that he is the person in whose favor, or under the circumstances in which the promise was intended to operate.

A careful perusal of this passage is sufficient to show that the *facts* here insisted upon as necessary to be proved by the claimant, are precisely equivalent to the facts which the United States are called upon to prove in this case. These facts, as I have before stated, bring the circumstances of the claim to the point where it appears that the responsibility for the injury rests upon Great Britain, *unless* due diligence was used by the Government to prevent the mischievous con-

duct of the subjects or residents of that kingdom which has produced the injuries complained of. In the absence of this due diligence on the part of that Government, the apparent responsibility rests undisturbed by the exculpation which the presence of due diligence will furnish. The party needing the benefit of this proof, upon every principle of sound reason, must furnish it. This is all we have insisted upon in the matter of the burden of proof.

In conclusion of the first chapter of this special argument, the eminent Counsel, at section 43 takes up the "*Terceira affair*" and insists that if Great Britain, in a particular situation for the exercise of duties of neutrality, took extraordinary measures, it does not prove that the Government were under obligation to take the same measures in every similar or comparable situation.

We referred to the "*Terceira*" affair for the purpose of showing that the Crown, by its prerogative, *possessed* authority for the interception of enterprises originating within the kingdom for the violation of neutrality. The question, whether the Executive will use it, is at *its* discretion. The *power* we prove, and, in the discussions in both Houses of Parliament, it was not denied, in any quarter, that the power existed to the extent that *we call for its exercise within British jurisdiction*. The question in controversy then was (although a great majority of both Houses voted *against* the resolutions condemning the action of the Government), whether, in the waters of Portugal or upon the seas, the Government could, with strong hand, seize or punish vessels which had violated the neutrality of Great Britain, by a hostile, though unarmed, expedition from its ports. The resolutions in both Houses of Parliament received the support of only a small minority. *Mr. Phillimore*, however, says the learned Counsel, expresses the opinion, in his valuable work, that the minority were right.

SIR ALEXANDER COCKBURN: I confess I always thought so myself.

MR. EVARTS: But the point now and here in discussion, is, what were the powers of the Crown *within* the limits of British jurisdiction, and it is not necessary to consider who were right or who were wrong in the divisions in Parliament. What all agreed in was, that the fault charged upon the Government was the invasion of the territorial rights of another nation.

But we cited the "Terceira" affair for the additional purpose of showing the actual *exercise* of the power in question, by the Crown, in that case. This was important to us in our argument; it justly gave support to the imputation that the powers of the Government were *not* diligently exercised during the American Rebellion, in our behalf. Where there is a will, there is a way; and diligence means the use of all the faculties necessary and suitable to the accomplishment of the proposed end.

Now, in conclusion, it must be apparent that the great interest, both in regard to the important controversy between the High Contracting Parties, and in regard to the principles of the law of nations to be here established, turns upon your award. That award is to settle two great questions: whether the acts which form the subject of the accusation and the defence, are shown to be acts that are proscribed by the law of nations, as expressed in the three rules of the treaty. You cannot alter the nature of the case between the two nations, as shown by the proofs. The facts being indisputably established in the proofs, you are then to pass upon the question whether the outfit of these tenders to carry forward the armament of the hostile expedition to be joined to it outside of Great Britain, is according to the law of nations, or not.

When you pass upon the question whether this is a violation of the second rule, you pass upon the question, under the law of nations, whether an obligation of a neutral not to allow a hostile expedition to go forth from its ports can be

evaded by having it sent forth in parcels, and having the combination made outside its waters. You cannot so decide in this case, and between these parties, without establishing by your award, as a general proposition, that the law of nations proscribing such hostile expeditions, may be wholly evaded, wholly set at naught by this equivocation and fraud practiced upon it; that this can be done, not by surprise,—for anything can be done by surprise,—but that it can be done *openly and of right*. These methods of combination outside of the neutral territory may be resorted to, for the violation of the obligations of neutrality, and yet the neutral nation, knowingly suffering and permitting it, is free from responsibility! This certainly is a great question.

If, as we must anticipate, you decide that these things are proscribed by the law of nations, the next question is, was “due diligence” used by Great Britain to prevent them.

The measure of diligence actually used by Great Britain, the ill consequences to the United States from a failure on the part of Great Britain to use a greater and better measure of diligence, are evident to all the world. Your judgment, then, upon the second question, is to pronounce whether that measure of diligence which was used and is known to have been used, and which produced no other result than the maintenance, for four years, of a maritime war, upon no other base than that furnished from the ports and waters of a neutral territory, *is* the measure of “due diligence,” to prevent such use of neutral territory, which is required by the three rules of the treaty of Washington for the exculpation of Great Britain.



## VIII

### ARGUMENT IN BEHALF OF OWNERS OF THE CARGO OF THE BARQUE "SPRINGBOK," CLAIMANTS AGAINST THE UNITED STATES, BEFORE THE MIXED COMMISSION ON BRITISH AND AMERICAN CLAIMS. (THE "SPRINGBOK" CASE)

#### NOTE

The barque "Springbok," laden with a large and valuable cargo of general merchandize, a very small portion of which was contraband of war, ship and cargo being the property of British subjects, sailed from London in December, 1862, bound for the port of Nassau, in New Providence, one of the Bahama Islands under British rule and jurisdiction. On her way the vessel with her cargo was captured by a United States cruiser and brought to New York as lawful prize of war, to be subjected to condemnation by the Courts of the United States. The ownership of the vessel was distinct from that of the cargo. Upon the trial in the United States District Court before Judge Betts, a decree of condemnation was entered against both ship and cargo. The decree of condemnation was based upon the findings of the Court that (in the language of the decree) "the said vessel, at the time of her capture at sea, was knowingly laden, in whole or in part, with articles contraband of war, with intent to deliver such articles to the aid and use of the enemy; that the true destination of the said ship and cargo was not to Nassau (a neutral port) and for trade and commerce, but to some port lawfully blockaded by the forces of the United States, and with intent to violate such blockade; and further that the papers of said vessel were simulated and false."

On appeal to the Supreme Court of the United States, the condemnation of the vessel was reversed but that of the cargo was sustained.\* The condemnation of the cargo proceeded upon the

\* Supreme Court Reports, 5 Wallace, 1. The Chief Justice delivered the opinion of the Court, four Associate Justices dissenting.

theory, which seems to have been based upon surmise, conjecture and moral probability rather than upon proof, that it was the intention of the owners of the cargo to transship at Nassau into some other vessel for the purpose of running the blockade of the Southern ports, and that this purpose under the doctrine of "continuous voyages," rendered the cargo subject to confiscation by the offended belligerent at any time during the voyage, after leaving the port of origin. The grounds of the decision of the Supreme Court are subjected to a critical analysis in Mr. Evarts's argument addressed to this Mixed Commission.

The Court's decision was, and has been ever since, the subject of much adverse criticism by publicists and authorities on international law the world over, as an extension of the doctrine of "continuous voyages" beyond all warrant of the law of prize, and as tending to establish an intolerable interference, by belligerent nations, with the lawful trade of neutrals between neutral ports. How truly it was said by Mr. Evarts in this argument that "The future interests of the United States imperatively demand that the barriers against belligerent pretension, which this case of the "Springbok" has overturned, should be firmly established by the judgment of this International Tribunal," was impressively brought home when Great Britain, at the time when the United States stood neutral in the European war, cited the "Springbok" decision to justify her interference with the commerce between neutral ports, in her attempt to cut off all intercourse with the Central European powers.

Wharton, in his international law digest (III, 404) has this to say of this argument, in an editorial note discussing the decision of the Supreme Court: "It is a matter of great regret, also, that the masterly argument of Mr. Evarts, before the mixed commission afterwards instructed to act on this class of claims, \* \* \* an argument which is one of the ablest expositions of international law in this relation which has ever appeared and is recognized as such by the highest foreign authority, had not been delivered before the Supreme Court, so as to have enabled that tribunal to become aware of the great gravity of the question involved."

Mr. Evarts's argument was presented to the Mixed Commission on British and American claims arising out of the Civil War, which

had been established under the Treaty of Washington of May 8, 1871. The British Government prosecuted the claim of the owners of the cargo of the "Springbok" before this commission and Mr. Evarts was retained by them in the matter. An oral argument of the case was not permitted and it was presented in printed form.

John Bassett Moore, who holds the chair of international law in Columbia University and has at various times been connected with the State Department at Washington, wrote of this argument in these words: "It has never been my good fortune to read a better argument in a prize case and I do not expect ever to see a better one. Each year since I came here (Columbia) I have had my students read it. No one but a great lawyer with a profound apprehension of the principles of international law could have made such an argument."

## ARGUMENT.

### STATEMENT OF THE CASE

The barque "Springbok" and her entire cargo were condemned as lawful prize of war to the United States steamer "Sonoma," by decree of the United States District Court for the Southern District of New York, on the 1st day of August, 1863.

The learned district judge, Betts, gave, in passing condemnation upon the barque and her cargo, as the ground of his decree,

That the said vessel, at the time of her capture at sea, was knowingly laden, in whole or in part, with articles contraband of war, with intent to deliver such articles to the aid and use of the enemy; that the true destination of the said ship and cargo was not to Nassau, a neutral port, and for trade and commerce, but to some port lawfully blockaded by the forces of the United States, and with intent to violate such blockade; and further, that the papers of the said vessel were simulated and false. Wherefore the condemnation and forfeiture of the vessel and cargo is declared. (Proof for Claimants, p. 25.)

Thus it appears, vessel and cargo were condemned in the District Court as taken *in delicto* on a voyage planned and prosecuted with intent to violate an existing blockade.

Upon appeal to the Supreme Court of the United States that Court reversed the condemnation of the vessel, and held that—

Her papers were regular, and they all showed that the voyage on which she was captured was from London to Nassau, both neutral ports within the definitions of neutrality furnished by the international law. The papers, too, were all genuine, and there was no concealment of any of them and no spoliation. Her owners were neutrals, and do not appear to have had any interest in the cargo and there is no sufficient proof that they had any knowledge of its alleged unlawful destination. The preparatory examinations do not contradict, but rather sustain the papers. (Case of the "Springbok," 5 Wall. 21.)

The Supreme Court, however, *affirmed* the condemnation of the cargo upon this conclusion, as to the ground of condemnation:

Upon the whole, we cannot doubt the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau in some vessel more likely to succeed in reaching safely a blockaded port than the Springbok; that the voyage from London to the blockaded port was, as regarded the cargo, both in law and in intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing. (*Ibid.*, pp. 27, 28.)

Thus it appears, condemnation passed finally upon the cargo, not as taken *in delicto* during a voyage in which the vessel carrying it was to be an agent of transportation with intent to violate the blockade, but simply as set in progress (by and through an innocent voyage of an innocent vessel to a lawful port) *towards* a purpose of thereafter obtaining transportation, by a voyage yet to be commenced, by some

unknown and unnamed guilty vessel to some unknown and unnamed blockaded port.

*View of the facts and the evidence upon which the Supreme Court drew the conclusion that the cargo was taken in delicto, as lawful prize, for attempt to violate the blockade:*

I. The bills of lading disclosed the contents of six hundred and nineteen, but concealed (*that is, did not mention*) the contents of thirteen hundred and eighty-eight, of the two thousand and seven packages which made up the cargo. Like those in the Bermuda case, they named no consignee, but required the cargo to be delivered to order or assigns. The manifest of the cargo also, like that in the Bermuda case, mentioned no consignee, but described the cargo as deliverable to order. Unlike those bills and that manifest, however, these concealed the names of the real owners as well as the contents of more than two-thirds of the packages. (5 Wallace, p. 24.)

The injurious inference and the damnatory imputation from this so-called "*concealing*" the contents of the packages is thus stated by the court:

The true reason must be found in the desire of the owners to hide from the scrutiny of the American cruisers the contraband character of a considerable portion of the contents of those packages. (*Ibid.*, p. 25.)

In the opinion of the Court the basis for injurious inference and damnatory imputation from the so-called "*concealing*" the names of the owners of the cargo, is not found in the papers of the prize or in the preparatory proofs in the cause, but solely in papers invoked at the hearing, from the case of the "Gertrude" and from the case of the "Stephen Hart." The only *fact* acquired from the invocation of the papers in the case of the "Gertrude" was, that Begbie, a claimant of the cargo of the "Springbok," was owner of the "Gertrude," and the only *fact* acquired from the papers of the "Stephen Hart" was that S. Isaac, Campbell and Co.,

also claimants of the cargo of the "Springbok," were the owners of the cargo of the "Stephen Hart." Upon these *facts* thus presented to the Court, the omission of the names of these owners of the cargo of the "Springbok" gives rise to this damnatory conclusion from such omission:

Clearly the true motive of this concealment must have been the apprehension of the claimants, that the disclosure of their names as owners would lead to the seizure of the ship in order to the condemnation of the cargo. (*Ibid.*, p. 25.)

But the Court hold expressly that—

"These concealments do not warrant condemnation" of the cargo, and broadly maintain that the cargo must be restored to the claimants "if the real intention of the owners was that the cargo should be landed at Nassau, and incorporated by real sale into the common stock of the island." (*Ibid.*, p. 25.)

II. The items of fact or surmise tending to a conclusion of a plan of transshipment at Nassau into a blockade-runner are gathered and combined by the Court, as follows:

(a) "The consignment, shown by the bills of lading and the manifest, was to order or assigns." This the Court regarded as *negating* the intent of *sale* at Nassau, "for had such sale been intended, it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading."

"This inference is regarded by the Court as strengthened," from the charterer's instructions to the master of the "Springbok" "to report to B. W. Hart, the agents of the charterers, at Nassau, and receive his instructions as to the delivery of the cargo. The property in it was to remain unchanged upon delivery. The agent was to receive it and execute the instructions of his principals." (*Ibid.*, p. 26.)

(b) The Court then undertake to "collect" what these instructions were "from the character of the cargo."

The characteristics of the cargo from which the unknown

instructions for its disposal at Nassau are to be collected, are the presence of "arms and munitions of war," in the shape of "sixteen dozen swords and ten dozen rifle bayonets, and the forty-five thousand navy buttons and the one hundred and fifty thousand army buttons," and of "*quasi* contraband," in the shape of "seven bales of army cloth and the twenty bales of army blankets." The conclusion drawn from these features of the cargo is thus stated:

We cannot look at such a cargo as this and doubt that a considerable portion of it was going to the rebel States, where alone it could be used; nor can we doubt that the whole cargo had one destination. (*Ibid.*, p. 27.)

(c) From "*ultimate destination*" of a considerable portion of this cargo for consumption in the rebel States, thus arrived at, the Court then reasons out the course by which the whole cargo, as a unit was to get there, as follows:

Now if this cargo was not to be carried to its ultimate destination by the "Springbok" (and the proof does not warrant us in saying that it was), the plan must have been to send it forward by transshipment. And we think it evident that such was the purpose.

The Court find, also, support for this inference from the invoked proofs, showing (1) "that Isaac, Campbell and Co. had before supplied military goods to the rebel authorities by indirect shipments, and (2) that Begbie was owner of the 'Gertrude' and engaged in the business of running the blockade." (*Ibid.*, p. 27.)

(d) The Court add an element of further support to their conclusion, as follows:

If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the "Gertrude" in the harbor of Nassau, with undenied intent to run the blockade, about the time when the arrival of the "Springbok" was expected there. It seems to us extremely probable that she had been sent to Nassau to await the arrival of the "Springbok,"

and to convey her cargo to a belligerent and blockaded port, and that she did not so convey it, only because the voyage was interrupted by the capture. (*Ibid.*, p. 27.)

(e) The only further makeweight in aid of these damnable surmises, suggested by the Court, is "the very remarkable fact," that the claimants never applied for leave to take further proof, and that the claims, as filed, were sworn to by the agent and proctor of the claimants, and not by them personally. (*Ibid.*, p. 27.)

The British subject, whose valuable cargo had been confiscated by this final sentence of the Supreme Court of the United States, upon the grounds of fact and of public law avowed by that court to be the basis of its judgment, represented to Her Majesty's Government the injury and injustice which they deemed themselves to have suffered at the hands of the prize jurisdiction in the court of last resort, and asked for its interposition with the Government of the United States for the relief of the injury, and the correction of the injustice they had suffered.

These British subjects supported their representation to Her Majesty's Government by the professional opinion of two very eminent English lawyers (Mr. Mellish, now Lord Justice of Appeal in the High Court of Chancery, and Mr. Vernon Harcourt), pointing out certain alleged misconceptions of evidence and errors of law and fact which exhibited themselves in the final sentence of the prize court.

Her Majesty's Government presents the case for redress to this International Tribunal, organized and sitting with plenary authority to that end, under the provisions of the Treaty of Washington. (Memorial of Claimants; Opinion of Counsel, pp. 30-35; Memorial of British Government; Proof for Claimants, pp. 39-44.)

*View of the principal matters of proof imported into the case before the mixed Commission, and of their relation, on*



*the one side and the other, to the matter in evidence before the prize courts.*

I. The claimants have made full proof that at the time the voyage of the "Springbok" was planned, and when it would have brought her to Nassau, there was a market at Nassau for all the various kinds of merchandise which made up the cargo of that vessel. The proof includes evidence of numerous business houses established there offering all these articles, by public advertisement in the newspapers, for sale by auction, as well as in ordinary trade. This proof is made by the production of the original newspapers of Nassau filed with the Mixed Commission, and pertinent extracts therefrom are appended to the claimant's petition. (Memorial, pp. 71-86.)

Besides this, the claimants have invoked the proofs pertinent to this topic from two other cases pending before the Mixed Commission, to wit, the case of *John C. Rahming vs. The United States*, No. 7, and the case of *Joseph Eneas vs. The United States*, No. 126. From these proofs the magnitude, variety, and activity of this market of Nassau for all the kinds of goods which make up the cargo of the "Springbok" abundantly appear.

Upon the cross-examination of John Norris Sleddon, a witness examined in Liverpool in behalf of the United States, the claimants have proved this condition of the market at Nassau very distinctly.

Cross-question 27: Has not a large business been for many years carried on between Great Britain and Nassau, consisting of the export of all kinds of merchandise from the former to the latter place? Answer: A large business was carried on during the war but before and since the business is by no means large.

Cross-question 29: Did you at any time during the war see any newspapers which had been published at Nassau? Answer: Yes; I saw them regularly.

Cross-question 30: Did not these newspapers contain many

advertisements relating to the sale of all kinds of merchandise, by auction or otherwise? Answer: Yes. (Deposition for Defense, p. 25.)

It is not too much to claim for the proofs on this point that they make a commercial adventure which should despatch a cargo, assorted as that of the "Springbok" was, for landing and sale in the market of Nassau as natural and probable a project as it was safe and legal. Every indication, therefore, in the lading of a vessel for that port which should suggest its probable "ultimate destination" as looking to its consumption in the rebel States, so far from raising a doubt of its being salable and meant for sale in the market of Nassau, would point directly to that conclusion. The moment, under this proof of the market at Nassau, it is conceded that the "Springbok" was bound to that port as the end of *her* voyage, and was there to unlade her cargo, all suspicions or surmises in regard to further projects for any parts of the cargo, from their character, are satisfied by the demand of the Nassau market for such merchandise *for its own enterprises projected, made up and prosecuted from thence.* (2-316.)

II. The claimants make full proof, by unexceptional witnesses, of the absolute regularity and conformity to every day usage, of the bills of lading, manifest, and form of consignment of all parts of the cargo of the "Springbok." (Proof for Claimants, p. 33.)

III. The claimants produce in evidence the various original policies of insurance, eleven in number, taken out by them on the cargo of the "Springbok," all exhibiting the risk insured *as beginning at London and ending at Nassau.* (Memorial of Claimants, pp. 35-71.)

IV. The claimants produce the deposition of B. W. Hart, to the whole of which the most careful attention of the commission is respectfully asked.

This deposition shows that the cargo of the "Springbok" was consigned to Hart for sale in Nassau *and remittance of*

*proceeds*, and as a shipment of part of a joint account adventure for that market, which covered the cargoes of two other vessels which arrived and were sold by Hart in Nassau. The cargo of the "Springbok," in anticipation of her arrival, was put upon the market in Nassau, and an advertisement prepared for the papers, and some portion of the cargo was actually sold "to arrive," including the two boxes marked buttons mentioned in the opinion of the Supreme Court. The letter of consignment of the three cargoes was received in due course of mail by way of New York, and was as follows:

71 JERMYN STREET, LONDON,  
December 19, 1862.

B. W. HART, ESQ., Nassau.

*Dear Sir:* By this mail we send you duplicates of invoices of shipments on joint account of ourselves, T. Stirling Begbie, Esq., and Messrs. Moses Brothers, per "Aries," "Springbok," and "Justitia." Duplicate bills of lading are enclosed. We hope these goods will arrive to a good market, realize good prices, and *that you will be able to remit to us without loss of time*, money being much wanted here at present.

(The bank rate was rising.)

The deposition of Mr. Hart shows that the cargo of the "Justitia" arrived at Nassau (having been transshipped at Bermuda) in January, 1863; was sold in the market there, and the proceeds remitted, and that the "Aries" sailed from England November 28, 1862, and arrived at Nassau January 20, 1863, when her cargo also was there sold by Hart.

The deposition also proves the valuation of the cargo of the "Springbok" as made at Nassau in May, 1863, and, according to the market prices current in February, 1863, amounting to £66,378 11s. 11d. (Deposition of Hart; Proof for Claimants, pp. 33, 38.)

Upon this deposition of Hart it is impossible to avoid the

conclusion that too rash a substitution of surmise for evidence, and of conjecture for facts, led the Supreme Court away from the true function of the prize jurisdiction, *dealing only with the voyage intercepted*, and involved it in a condemnation of the *system of trade* of which Nassau had become the entrepôt.

V. Upon the proofs invoked by the claimants from the case of *John Riley vs. The United States*, No. 442, before the Mixed Commission (being the case of the *barque* "Springbok"), an inspection of the documents exhibits the singular error of fact with which the Supreme Court started in its inspection of this cargo for evidence of guilt. What the Supreme Court calls "arms" and counts as "sixteen dozen swords" and "ten dozen rifle bayonets," upon the actual proofs in the prize cause itself, turn out to have been *one* sample case, containing *one* dozen cavalry swords and *one* dozen rifle bayonets. (Case of *Riley vs. U. S.*, page 156; Case A 1406.

The depositions of Thomas May, Edward Russel Cummins and Thomas Stirling Begbie, forming part of the "Depositions for Claimant" in case of *Riley vs. United States*, and found at pages 1 to 11, exhibit the perfectly neutral character of the voyage and cargo of the "Springbok."

An examination of the "marshal's return" to the prize court of the sale of the cargo of the "Springbok" exhibits the utter insignificance of what the Supreme Court regarded as contraband, or *quasi* contraband, and suffered to carry such widespread infection through as inoffensive a cargo of dry goods, haberdashery, and groceries (see catalogue of sale on file with Commission), as ever crossed the ocean, and to impart such disastrous weight in determining the injurious surmises under which the condemnation of the entire cargo passed.

It will be found that the proceeds of the "swords and bayonets" were but \$35, and of the "military and naval

buttons" but \$235, showing for "arms and munitions of war," in the language of the Supreme Court, but \$270 out of gross proceeds of entire cargo of nearly \$250,000.

Again: if the proceeds of the *quasi* contraband—the so-called army blankets, etc., and the ten kegs of saltpetre be added—the whole will come to less than one per cent of the proceeds of cargo at the marshal's sale.

VI. The claimant's proofs displace entirely the theory upon which the Supreme Court satisfied itself that the steamer "Gertrude" was to receive the cargo of the "Springbok," the transshipment of which the Court imagined she had been sent to receive, and was awaiting in the port of Nassau, when the capture of the "Springbok" disappointed the project.

The proofs show that on the *third day of February, 1863*, when the "Springbok" was captured off Nassau, the "Gertrude" was lying off *Queenstown, in Ireland*, having arrived there from Greenock, January 31.

The log of this voyage and the deposition of James Raison, master of the "Gertrude," established these facts beyond controversy. (Claimants' Memorial, pp. 17 to 19.)

The proofs invoked from the case of the "Gertrude" upon the trial of the "Springbok" showed that the "Gertrude" received her lading at Nassau on the *eighth day of April*, and there is no evidence of her earlier presence in that port. (Case of *Riley vs. U. S.*, pp. 171-2.)

#### PROOFS ADDUCED BY THE UNITED STATES.

I. The United States examined, on due notice, one witness, *John Norris Sleddon*, whom the claimants duly cross-examined.

The only purpose or effort of this evidence is to attempt to show that T. Stirling Begbie, one of the claimants of the cargo of the "Springbok," had been, or had the reputation of having been, connected with blockade-running projects

and voyages. These trading enterprises with which the witness attempts to connect Mr. Begbie were all a *year or more later in date than this voyage of the "Springbok."* The witness is not asked about "Moses Bros.," and knows nothing about "S. Isaac, Campbell & Co.," the other claimants, in this connection.

*All* that the witness contributes to the case respecting the "Springbok" or her voyage is as follows:

Cross-question 51: Do you of your own knowledge know anything of the cargo of the "Springbok," or of the circumstances under which it was shipped from London? Answer: Of my own knowledge I do not. I simply know of the transaction by having heard Mr. Begbie speak of it during the war.

Cross-question 52: Can you tell when you first saw Mr. Begbie? Answer: It would be about the latter end of 1863. (Deposition for Defence, pp. 13, 14.)

The United States permit this witness to sum up his knowledge and wisdom about this case as follows:

Re-direct 22: Do you wish to make any special remark in regard to the "Springbok" or her cargo? With respect to the "Springbok" herself, that is, the vessel, I have no doubt, from my knowledge of the trade, that Nassau or Bermuda was her ultimate destination, and I have no idea that she ever intended to run the blockade; but with respect to the cargo, *from my knowledge of Mr. Begbie's connection with blockade-running*, I should judge that it was intended for the blockade ports, *whether sold or unsold at Nassau or Bermuda.*

It is apparent that on this estimate of the case against the cargo, no condemnation could be asked, *for the sale in the market at Nassau* seemed to the witness as probable a project of these parties as any other.

II. The United States have produced, under the simple authentication of the certificate of "Geo. M. Robeson, acting Secretary of War," dated April 7, 1873, what purports to be copies of letters and accounts, being "extracts from the

records of the so-called Confederate States of America, captured by the forces of the United States, and now being in the custody of this Department; the extracts being all that pertains to the case of S. Isaac, Campbell & Co., in the documents from which they are made."

These papers covered a period from *January, 1862, to July, 1864*, that is, for a period beginning a year before the voyage of the "Springbok" commenced, and ending eighteen months after the capture.

The object and bearing of this evidence, in favor of the United States, are simply to show the range and extent of the commercial undertakings of the house of S. Isaac, Campbell & Co., of London, in supplying the wants from foreign trade of the people and authorities of the rebel States. The papers, undoubtedly, tend to show a commercial interest in favor of the "Confederacy," active and open, just as other prominent London houses espoused and aided, commercially, and much more extensively, the other belligerent in the pending war.

Upon what principles this evidence, thus certified, is supposed to carry authority for its admission in this tribunal of international authority, is not readily perceived. The claimants suppose themselves at least to have been entitled to notice and cross-examination, and the production of countervailing evidence from the same public repository.

But the real importance of this great draught of evidence, thus fished up, is, *from the unlimited exploration of all the dealings of this firm and any of its agents or correspondents, and of the agents and correspondents of the commercial or public interests of the people or Government of the rebel States, to demonstrate by the most exhaustive negative imaginable, that the voyage and cargo of the "Springbok" were not embraced or touched by any of these dealings thus explored, and thus are placed above suspicion as a mere commercial consignment to the market of Nassau.*

III. The United States have also included in the same "Proofs for Defence," and covered by a similar certification, a contract of "T. Stirling Begbie," bearing no date, but evidently made after *December*, 1863, for providing steamers (to run to blockaded ports presumptively), and some appurtenant transactions not very definite or important. (Proofs for Defence, pp. 83-90.)

The same observations apply to the proofs, thus introduced, in respect to the claimant *Begbie* as are made above in respect of the claimants, S. Isaac, Campbell & Co.

We have thus a *complete exhaustion of the transactions of all the claimants, deemed questionable, and a demonstration that the voyage and cargo of the "Springbok" lay outside of, and are not touched by, the unneutral dealings.*

#### ARGUMENT

##### *Importance of the case.*

The case of the "Springbok," as it stands upon the list of the Mixed Commission, and is to be determined by their judgment, is justly considered by the publicists of the two nations for the settlement of whose reciprocal grievances, arising during the period of the late civil war, this international tribunal has been established, and, not less, by the publicists of Continental Europe, as of capital importance.

In the first place, the case as a *prize cause*, to be passed upon according to the procedure and principles of that special jurisdiction, was both novel and interesting. Accordingly it excited much attention from learned authors and eminent diplomatists, while it was *sub judice* in the prize court of the first instance, and far greater when it reached the Supreme Court of the United States, of so great authority on the law of nations, where it was, as a mere question of prize, finally determined.

But when the actual judgment of the Supreme Court of the United States was announced, carrying the condemnation



to the extent, and supporting it upon the principles of law and of evidence which that judgment declared, the interest of publicists and of statesmen in the case and the question was quickened and extended.

The extreme pretensions of belligerent right to subjugate neutral commerce to its necessities, which this condemnation imported, and the wide influence upon neutral commerce in time of war which was to follow, if this new instance of prize law, as declared by the Court of a belligerent, should be accepted by the great maritime powers as regulating the duties of neutrals in the future, made the case one of attentive consideration and responsible discussion with the principal Cabinets of Europe, as well as of representation on the part of Her Majesty's Government to that of the United States.

It may be considered as a fortunate circumstance that the dispersed protracted debate to which, otherwise, this whole subject would have been destined, without any prospect of definite solution until, unhappily, the prize jurisdiction of some maritime power should again be invoked to pass upon it, is so quickly superseded by a submission of the controverted public doctrine to a tribunal of the credit and dignity, under the law of nations, of this Mixed Commission. This delegated authority represents the great commercial nations of Great Britain and the United States, and of United Italy, whose great share in the past history of the world's public law and of the world's commerce may yet be rivaled in the growing fortunes of her new kingdom.

*The claimants of the condemned cargo of the "Springbok" will be entitled to restitution and indemnity from the United States in case the Mixed Commission shall be satisfied of either of the three following propositions:*

I. That the actual judgment of the Supreme Court of the United States has disregarded the essential principles of the

prize jurisdiction (by whose adjudication, and not otherwise, do neutral nations submit to have the fortunes of their subjects' maritime property even *prima facie* determined), in its condemnation of the cargo of the "Springbok," irrespective of any conclusion as to what the probable fate of the cargo would have been, after a trial in which the principles of the prize jurisdiction had been properly adhered to.

In other words, the function of this tribunal is *to restore the property if not properly condemned by the prize court*—not to revive the prize jurisdiction and recondemn the property; or,

II. That, upon the facts of the case, as apparent upon the trial of the prize cause and made the basis of the condemnation by the Supreme Court, there was no adequate ground for the conclusions drawn therefrom by the Court to the condemnation of the cargo; or,

III. That, upon the facts of the case, upon the whole proofs as now presented to the Mixed Commission, the judgment of the Supreme Court is shown to have been erroneous in its misconception or misconstruction of facts, in its adoption of conjectures, now shown to be baseless, in place of awaiting proofs, or in its acceptance of false rules of guilt, in place of the true doctrines of the law of nations, upon which the question of guilt or innocence is determinable.

*General principles of the prize jurisdiction which need to be considered:*

I. As the ownership of both vessel and cargo, and the scheme and conduct of the voyage and its commerce (whatever the latter may be held to have included of ultimate destination in its project), were wholly British, it is manifest that the limits of all possible discussion in the case must be confined to the question whether the actual interference with the said voyage and commerce, and the confiscation of the whole cargo by the United States, one of the belligerents,

was within the submission of neutral nations of the freedom and inviolability of their maritime commerce to the exigencies of belligerent right. If in the deliberate and enlightened judgment of this tribunal it shall be so held, then belligerent right, and neutral subjection to it, will have received an authentic exposition the wide consequences of which it would be difficult to overestimate. If, on the other hand, this tribunal shall reject this pretension and extension of belligerent right, as beyond the warrant of the law of nations, this excess of belligerent power will be condemned as such, and, instead of its spreading its evil example in the future, will become a barrier against future attempts upon that just liberty of neutral commerce which is the great interest that civilization and morality oppose to the passions and cupidity of maritime warfare.

II. The recognized belligerent right to pursue the enemy's commerce upon the high seas, and the repugnant neutral right to maintain its commerce upon the high seas unaffected by a warfare to which it is not a party and should not be a prey, have brought about, in the interests of peace and in recognition of the necessities of belligerents, a certain degree and measure of concession on the part of neutrals to the exigencies of the war, of which, not transcended, they will bear the molestation without resentment.

For the purposes of the present discussion, the adjustment of this conflict between belligerent and neutral rights and interests, which constitutes the law of nations on this subject, may be stated as follows:

(a) Enemy property, as such, and without other feature or inquiry, being exposed to capture or destruction by the hostile power, and neutral property, as such *simpliciter*, being absolutely exempt from capture or destruction by either belligerent, neutrals consent that the verification of the character of the property, as being neutral or belligerent, shall be submitted to by neutrals, *by visitation and search at sea*.

(b) Further interference with the voyage or property, neutrals do not permit, *unless* by the visitation and search, and from what is then and there disclosed respecting the voyage and property, some fault or defect in the enterprise, as really neutral, exhibits itself to the visiting cruiser. In that case, *and in that case only*, neutrals permit, not confiscation or destruction, or the least spoliation of property or molestation of the ship's company, but capture and submission to the prize jurisdiction for its more deliberate examination, and more competent decision.

(c) Neutrals require that the prize investigation shall be limited to the evidence that the voyage, vessel, and ship's company supply, and to the issue whether the *capture* was warranted by what that evidence discloses; and *this* condition of the prize investigation is not a question of form, practice, or procedure, but an essential limitation of the submission of neutrals in the degree and nature of the interference with their commerce that they will tolerate.

The moment you depart from this vital principle of the prize jurisdiction, to wit: *that the capture is to be judged of as it was made, and on the evidence on which it was made*, and the captors acquitted or condemned in damages or costs, and the belligerent nation held to accountability by the offended neutral according to the facts as appearing on the capture and the evidence of the prize itself, you subject neutral commerce to an unchecked and speculative cupidity of captors, and to delays and miscarriages of *visitation and search in Court* for suspicion, and of remote and crippled litigation to establish guilt or innocence, by imputed or extraneous evidence, which neutrals never have submitted to, and never can tolerate.

(d) The practical maintenance of this great safeguard of neutral commerce against speculative or *hopeful* capture (upon the calculation that something may *turn up* to justify it and make it gainful), and against practices upon the prize

court in the way of simulated or specious evidence, or against the Court's own unchecked surmises or imaginative ingenuity, is secured by the *firm and undeviating rule* of the prize courts never to admit *further proof* as part of the original inquiry, never to admit it upon the motives or the interests of the captors or the claimants, but always to introduce it, if at all, upon and for a resolution of the difficulties which the primary evidence *itself* raises, and for the clearing of which, for the Court's conscience in the adjudication, and in the mere motive of assurance in its justice, it seeks for light, till then forbidden.

Accordingly, further proof is never admitted to raise a doubt, nor, on the other hand, is a doubt, difficulty, speculation, or surmise, which the primary proof raises in the mind of the court ever sufficient to draw or sustain any other determination of the matter in hand, than *to order further proof*. An adjudication of condemnation never proceeds upon a *doubt or difficulty* raised upon the primary proofs. The only question is, and the prize courts consider that a grave one, whether the doubt or difficulty is of such substantial character as to put the neutral to the delay and expense of further proof, or whether acquittal should follow, although without full assurance of its duty.

When further proof is ordered from a claimant, it is upon a consideration that it will be just to condemn on the *primary proofs*, if the damnable features are not susceptible of explanation, but not just to assume they are not susceptible of explanation, without opening an opportunity of explanation by extraneous evidence.

But a prize court, which observes the true principles of its jurisdiction, never admits doubts or difficulties from extraneous sources and demands further proof to allay them; or, if this last proposition, in extreme cases, should be qualified, no prize court ever admits doubts or difficulties from extraneous sources, and proceeds any further upon them to the

prejudice of the claimant, than to order further proof. It would be a complete subversion of the essential principles of the prize jurisdiction to accept suspicions and surmises from extraneous evidence, and proceed upon them as adequate, without having opened them to correction by further proof.

(e) When the neutral character of the property is unquestionable, then the limits of visitation and search, capture, investigation, primary judgment, further proof, and final adjudication above insisted upon are applicable, even more stringently, to the only point of enquiry for the prize jurisdiction, to wit: Whether the property and commerce, being neutral, are affected with any unneutral participation in the war that exposes them to interference by capture and the property to confiscation by any of the rules of the law of nations accepted between belligerents and neutrals, as abridging the freedom of neutrals' commerce.

We say these limitations of belligerent right are more stringent, in the admitted situation of the property and voyage being really neutral in interest and management, than in the controversy *whether* the property is enemy or neutral. The moment it is decided to be enemy, there is an end of rights on the one hand or of limits of power on the other.

But when the question is of *unneutral dealing in the commerce owned and pursued by neutrals*, then all presumptions favor exemptions—the *burden of proof lies wholly on the belligerent*. No duty of the neutral requires it to regulate its trade, except so far as to have it free from unneutral participation in the war, and interception and vexation, even of neutral commerce, on speculative grounds, are justly resented by the neutral nation.

An observance by the belligerent of all limitations in his right of search, capture, and adjudication is justly expected when it is indisputable that the limit is and has been understood to be, what might be lawfully done by a belligerent

to a neutral, not whether the interest touched was really enemy and only fraudulently neutral.

(f) Neutral nations submit to have their maritime commerce and voyages interfered with by capture, detention, and prize adjudication only when the voyage is being pursued:

(1) In the carriage of contraband in trade with a belligerent; or,

(2) In a voyage to a port of a belligerent, with whatever cargo, which is actually blockaded by the other belligerent; and,

(3) In either case the neutrals limit the exposures of the voyage or the property that they will tolerate, to capture while *in delicto*, that is, during the voyage to the deposit of the contraband and return, in the one case, and during the voyage to the blockaded port and return, in the other, and under no other circumstances.

(g) It will be perceived, therefore, that the predicament of lawful condemnation of a vessel or cargo inculpated for traffic in contraband or breach of blockade involves a definite voyage between the *terminus a quo* and the *terminus ad quem*, on which the guilty vessel is captured, and that this arrest *in delicto* is as necessary to a condemnation as the guilt itself.

Neutrals are unwilling that their commerce shall be vexed and harassed by any interference with vehicle or cargo, except by interception while on the voyage in which the contraband cargo is to be or has been deposited, or on the very voyage in which the blockade is to be or has been penetrated.

These principles of the prize jurisdiction are believed to be indisputable and of universal authority. It is only necessary to recall to the attention of the tribunal a few passages from elementary writers on the subject.

Thus Sir William Scott and Sir John Nicholls, in their celebrated letter to John Jay, United States minister to

they may introduce papers taken on board another ship, if they are properly verified by affidavit; and they may also invoke papers from another prize cause. Story on Prize Courts, (by Pratt,) pp. 17, 18, 24, 25, 26.

The French regulations were thorough and peremptory on this subject of the confinement of the proof to the papers and persons on board of the prize. (Quoted in *note* to Story on Prize Courts. p. 17.)

*Complete jurisdiction and authority of the Mixed Commission to redress any injury or injustice suffered by the claimants in the prize cause by the sentence therein.*

This tribunal has already and repeatedly had occasion to consider its powers, and has not hesitated to exercise them in according reparation to claimants who have suffered from an unwarranted sentence of a prize court. That the sentence complained of as a grievance was pronounced by the highest tribunal of the jurisdiction, so far from being a reason why the office of redressing the injury should be declined by this Mixed Commission, it is, as we all know, a condition required by the principles which govern such international commissions, and insisted upon by this tribunal, that the aggrieved parties should have exhausted their right to appeal in the municipal jurisdiction before they have a standing in the international court for the invocation of its justice.

It is important to recall, what is not to be controverted, that the doctrine of *res judicata*—a matter adjudged and not to be judicially re-examined—has no application to the situation in which the sentence of a prize court is presented for the review to such a tribunal as this Mixed Commission.

The sentence of a prize court binds everywhere upon the two points: (1) of change of property in the *res* warranted by the condemnation, and (2) the justification of the captors against all personal recourse or question for their acts elsewhere.



For the rest, the prize jurisdiction is but an inquisition held by the Government through its special court of prize upon the *capture* (which has been made under its assumed instruction and authority by the cruiser), to determine whether such capture shall be assumed and justified by the Government as in obedience to *its* warrant to the cruiser, and in conformity to *its* views of belligerent right. If it be found upon this inquisition that the capture is so justified, the act is adopted by the Government, and responsibility therefor assumed towards the neutral power, and from that moment only does the matter become one of direct recourse and accountability between the two nations. Such is the situation here in the matter of the cargo of the "Springbok" between the Government of Great Britain and that of the United States.

Accordingly Wheaton says:

The jurisdiction of the Court of the capturing nation is conclusive upon the question of property in the captured thing. Its sentence forecloses all controversy as between claimant and captors and those claiming under them, and terminates all ordinary judicial inquiry upon the subject-matter. When the responsibility of the captor ceases, that of the capturing State begins. It is responsible to other States for the acts of the captors under its commission the moment their acts are confirmed by the definite sentence of the tribunal which it has appointed to determine the validity of captures in war.

An unjust sentence must certainly be considered a denial of justice, unless the mere privilege of being heard before condemnation is all that is included in the idea of justice.

The moment the decision of the tribunal of the last resort has been pronounced (supposing it not to be warranted by the facts of the case, and by the law of nations applied to these facts), and justice has been thus finally denied, the capture and the condemnation become the acts of the State, *for which the State is responsible to the Government of the claimant.* (Wheaton's Elements, part IV., ch. 2, sec. 15.)

The attention of the Mixed Commission has been repeatedly called to the precedent of the authority exercised by a similar commission under the British treaty of 1794, and of the discussion between the British and American commissioners on the point, the American commissioners sustaining the fullness and supremacy of the jurisdiction which the British commissioners questioned. The disposition made of the doubt by the Lord Chancellor (Loughborough), in his answer to the fifth commissioner, Colonel Trumbull, who had submitted the point for his advice, is well known:

The construction of the American gentleman is correct. It was the intention of the high contracting parties to the treaty to clothe this commission with power paramount to all the maritime courts of both nations—a power to review and (if in their opinion it should appear just) to revise the decisions of any or all the maritime courts of both. (Trumbull's *Reminiscences of his Own Times*, p. 193.)

In the discussions of the "Tribunal of Arbitration" at Geneva, the question came up upon the effect of the sentence of the Vice Admiralty Court at Nassau, acquitting the "Florida," on libel of the Crown, for violation of the neutrality act of Great Britain. As is well known, the tribunal held Great Britain responsible for the "Florida," notwithstanding the adjudication of its admiralty court having jurisdiction.

*Posture of the memorialists representing the cargo of the "Springbok," and asking indemnity for its confiscation.*

The claimants in the prize court of the cargo of the "Springbok," viz., the firm of S. Isaac, Campbell, and Co., of London, and Thomas Stirling Begbie, also of London, are the memorialists here.

The firm of S. Isaac, Campbell & Co., was at the time of these transactions, composed of Samuel Isaac and Saul Isaac, and had no other partner. (The duly accredited

attorney-in-fact of the memorialists, before this commission, Dugald Forbes Campbell, Esq., of London, whose powers duly verified are filed with the Commission, is not to be taken, from the name of Campbell appearing in the firm of S. Isaac, Campbell & Co., to have had any connection with the transactions of the voyage of the "Springbok." That firm had no partner of the name of Campbell, as is shown in the prize causes and in the present memorial. Mr. D. Forbes Campbell represents the existing interests in the claim, which, as is stated in the memorial, are largely those of creditors of the original parties.)

Though the whole legal interest in the cargo, at the time and since, was in these merchants, yet, in respect of one undivided third of the cargo, one Joseph Moses, trading under the firm of Moses Bros., of London, had a beneficial interest or trust. One of the bills of lading of teas, coffee, and groceries, being six hundred and sixty-six packages, names Moses Brothers as shippers. (Memorial, p. 2; B. L. No. 6, Proofs in Prize Cause.)

*The decree of the district court.*

This may be dismissed in a few words. Its purport and reason have been given already in the "Statement" which forms a part of this argument.

The condemnation of vessel and cargo there pronounced involved no novel, difficult, delicate, or dangerous doctrines of prize law. It proceeded on the ground that the "Springbok" and her cargo were bound for a blockaded port, and that the papers of the voyage to Nassau were false and simulated. No criticism of this as a legal ground of condemnation is possible. There is one fatal objection to the sentence, and that is, there is not the least support in the evidence for the conclusions of fact so rashly arrived at by the court. It was a violent injustice, and *its* ground of condemnation has been flatly rejected by the Supreme Court.

The Supreme Court's sentence of restitution of the ship, and its condemnation of cargo, on the theory of a projected further voyage of the cargo, by transshipment, to a blockaded port, are equally inconsistent with the sentence of the district court and its reasons. The decree of the Supreme Court is a complete answer to that of the district court.

It is only the condemnation of the Supreme Court, and the grounds of it, that will be further treated in this argument.

*The grounds on which the Supreme Court draws its damnable conclusions ON QUESTIONS OF FACT examined.*

We have presented in detail, and in connection in the "Statement," which forms part of this argument, the various items of imputation or suspicion to the prejudice of the cargo of the "Springbok" upon which the Supreme Court based its condemnation. It is now our purpose to subject each one of these *items*, which collectively make up the whole case upon which the decree of the Supreme Court rests, to the test of a careful and candid examination.

I. The bills of lading did not set forth the contents of 1,388 packages, naming the contents of only 619 packages, and the manifest followed the bills of lading in this respect. The only imputation from this form of description of cargo in these mercantile documents made against the integrity of the enterprise, as within the freedom of neutral commerce, is "the desire of the owners to hide from the scrutiny of the American cruisers the contraband character of a considerable portion of the contents of these packages."

This objection to the regularity of the documents will not bear a moment's attention.

(a) The discrimination made between packages of which the contents are mentioned and those of which the contents are not mentioned, turned entirely upon the trade regulations of Great Britain and not at all upon the contraband or

peaceful nature of the contents. The teas, coffees, spices, and groceries, which were mentioned as contents of packages, were not the growth of Great Britain, and had been imported. The re-exportation from Great Britain of these articles, as matters of revenue and trade returns, requires their description in the documents of exportation if the shippers are to have the advantage of the customs regulations in that behalf. This accounts for the mention of contents in these packages, and shows the absence of sinister motive or design in the discrimination which is looked upon with suspicion.

Thus we find it stated in the prize cause that the "cargo books" found on board exhibited all this, and the following "memorandum" is entered in the cause:

Mem.—The cargo-book, marked K, contained a list of all the cases, casks, barrels, etc., with their corresponding marks and numbers, with their length, breadth, and solid contents, all tallying with the bills of lading, *and enumerating the articles not the product of Great Britain, namely—tea, pepper, coffee, ginger, and cloves.* (Memorial, etc. in *Riley vs. The United States*, No. 442, p. 132.)

(b) But of the 1,388 packages, the contents of which were *not* set forth in the bills of lading or the manifest, or the cargo book, confessedly, no more than some twenty-odd contained anything that was not as innocent as the teas or spices; "Scotch gingham," "cotton handkerchiefs," "printed muslins," "shirts," "drawers," "gloves," "spool cotton," "needles," "gaiters," "cloths," in great quantities, made up the cargo. The omission to name these contents could be imputed to no motive of concealment, and is, manifestly, answered by the conformity to every-day commerce, which made such details in voyages from Great Britain to her colonies, wholly insignificant, and therefore, burdensome.

(c) But the so-called contraband on board which, like a

needle in a hay-stack, was to be hidden by this cunning contrivance, might have been named with perfect impunity, and by full commercial description, and no cruiser would have imagined evil therefrom. Take the sample case with a dozen swords and a dozen bayonets! Is that worth hiding? Is that to expose a cargo of groceries and dry goods? Was it to carry *that* to the armies of the rebellion that £60,000 worth of innocent cargo were to be risked? Then the buttons! "Two cases of buttons" would have been all that they would have designated on a bill of lading or a ship's manifest, under the most exacting precision. What exposure would have come from this?

So, too, the twenty bales of blankets and the ten kegs of saltpetre, or nitrate of potash, such a description would have been a matter of the utmost indifference, as items in a cargo like this.

(d) But the whole argument of guilty motive, to escape suspicion from the visiting cruiser by the suppression of contents, refutes itself.

Its whole weight rests upon the idea that honest neutral cargo would, regularly, give its contents in the bills of lading and manifest; and *to avoid suspicion*, these shippers thrust in the face of the boarding officer documents on *their* face betraying irregularity, concealment, guilt! Why, the only reason the captors have ever suggested for sending in the "Springbok," was, the bills of lading and manifest not disclosing the contents. To be sure, under the light of the evidence, showing the every-day regularity of these papers, the ignorance or willfulness of the captors in so treating these papers is manifest. But we are dealing with the argument of the Supreme Court, which finds these papers so suspicious as to condemn, and yet finds they were put in this shape to meet the scrutiny of the cruisers! The argument is *felo de se*.

II. The bills of lading and the manifest following, as it is

made up from them, gave Spyer and Haywood, and Moses Brothers, as shippers, and not Begbie and S. Isaac, Campbell & Co., and this is treated by the Court as grave matter of "concealment," with a purpose of protecting the cargo.

The Court find in the invoked papers from the "Gertrude" and the "Stephen Hart" the inference that the disclosure of the names of Begbie and S. Isaac Campbell & Co., as owners, "would lead to the seizure of the ship in order to the condemnation of the cargo," and infer guilt from this concealment. A few words will dispose of this somewhat thoughtless suggestion.

The point about *Begbie* is that the cruiser that should overhaul the "Springbok," seeing that Begbie was an owner of cargo [who is assumed to be of ill-repute, with the cruiser, by reason of his known connection with the "Gertrude," a detected blockade-runner], would send in the "Springbok" on *that* ground of suspicion.

But this is an *anachronism* of the most flagrant character. The "Springbok" was overhauled just off Nassau, on the 3rd February, 1863, and the "Gertrude" did not load at Nassau for her blockade-running voyage, which was to expose her owner, Begbie, to the suspicion of the cruiser that was to overhaul the "Springbok" *till the 8th of April, 1863.*

The fact is, however, that Begbie's name was "disclosed" in the charter-party found among the ship's papers on her capture.

So much for this ground of suspicion and the danger to the administration of justice when suspicion and hypothesis are suffered to beguile the judgment of so great a court.

But the Court find a similar motive in respect to the so-called "*concealment*" of *S. Isaac, Campbell & Co.*, as owners of the cargo of the "Springbok" from their having been concerned, it is said, with the case of the "Stephen Hart," which had in fact been seized and sent in before the capture of the "Springbok."

This "concealment," which weighed so heavily with the Supreme Court against the cargo of the "Springbok," is readily disposed of, not as an anachronism, but as a mere oversight on the part of the Court. There was no concealment at all. The ship's papers, which came into the hands of the boarding officer (with the bills of lading and manifest which name Spyer and Haywood as shippers of the cargo), also included the letter of advice from Spyer & Haywood to the consignee at Nassau, *enclosing the very bills of lading*, showing that S. Isaac, Campbell & Co. were the owners of the cargo so shipped, and Spyer & Haywood were mere shipping agents. The letter is as follows:

"Springbok."

LONDON, 8th Dec., 1862.  
15, Billiter-street.

B. W. HART, Esq., Nassau.

*Dear Sir:* Under instructions from Messrs. S. Isaac, Campbell & Co., of Jermyn street, we inclose you bills of lading for goods shipped per "Springbok" consigned to you.

Trusting to safe arrival of the ship, we are, dear sir, yours, obed'tly,

SPYER & HAYWOOD,  
*Agents for Messrs. S. Isaac, Campbell & Co.*

(*Riley vs. United States*, 442, p. 100.)

We have so completely disposed of these *grounds of suspicion* on which the Court laid so much stress as matters of fact, that we dismiss them with a single suggestion as to the poor support to the inference of the Court which they would have afforded had the facts been as the Court conceived and stated them.

No neutral nation will ever tolerate the interception of a voyage, and sending in as prize, of a ship *whose papers are regular and whose own adventure presents no ground for detention*, upon the extraneous fact, that the owners of cargo have had connection with other adventures which



have been good prize. The capturing officer who should so deal with captures would be more likely to be cashiered than to earn prize money.

III. The only further ground which the Supreme Court find for condemning the cargo of the "Springbok" is the conclusion that it was intended to be carried on, by transshipment in another vessel, to violate the blockade. The steps of the Court's reasoning are as follows:

(1) It is apparent from the terms of consignment that the cargo was not sold to the consignee, but remained the property of the shippers, to be disposed of by the consignee according to their instructions.

(2) The Court then, without disguise, *and without any pretense of evidence of any instructions to forward or transship*, proceed to make up instructions, purely inferential, and wholly deduced from the "character of the cargo."

The only "character" from which these hypothetical instructions are evolved is the swords and bayonets, buttons and blankets. The dozen swords and dozen bayonets, by some unexplained and inexplicable error of the court, are multiplied into "sixteen dozen words and ten dozen bayonets," and thus are made out a consignment of "arms," *importing a military supply, which infers destination*. The two cases of buttons are magnified "into munitions of war," justifying a like inference of destination, and then the twenty bales of blankets, at best but *incipitibus usus*, are made out as looking to the same market.

Now, under the evidence that Nassau was an entrepôt where all such articles had a ready market, the moment the Court had decided that the voyage of the "Springbok" ended at Nassau, it is manifest that, in the nature of things, no inference could be justified, from the *character of the articles*, either that they were to be sold in Nassau or sent forward. Yet the whole reasoning of the Court, in its invention of instructions to transship, which are to condemn the cargo,

makes out the instructions from the cargo itself—that is to say, the only voyage for which the cargo was ever actually laden, having its end at Nassau, and a further voyage *intended* being essential to be *proved* before the cargo can be condemned, the Court allows the *cargo itself* to prove a further voyage, as a necessary inference from the contraband features of, say, one per cent. of its bulk or value!

It is vain to make two stages, for the reasoning, viz.: that instructions to transship would condemn, if proved, and the character of the cargo proves such instructions. The only effect or suspicion is the cargo itself, and, reduced to its real meaning, the condemnation is based, not upon any instructions for any voyage proved, nor on any voyage proved, but on the contraband nature of the cargo importing, *de jure*, a hostile destination. Reduced to its true elements, in face of the market of Nassau, made for and swallowing cargo after cargo of goods, to be again sold for the market of the rebel States, the reasoning of the Supreme Court is wholly untenable.

(3) But from its inference against the one per cent. of the cargo, which it selects as importing a hostile ultimate destination for *it*, the Court proceeds, *per saltum*, to the conclusion that the *whole cargo* was going to the same destination.

Against reasoning like this, no obstacle can be successfully opposed. It rests upon nothing, in nature of evidence, and demands condemnation upon the force of suspicion alone.

It says the *proved voyage* ended at Nassau, and the ship and cargo were there to part; a further voyage by another ship must be found against the owners of the cargo or it cannot be condemned; none such is proved, but we think the cargo *must have expected a further voyage and, for that reason, we condemn it on its face.*

(4) The Court from its conclusions thus reached: (1) that the cargo *was* to go forward to a market in the rebel

States, and (2) that it was *not* to go by the "Springbok"—reasons out that "the plan must have been to send it forward by transshipment." This, as an abstract proposition, seems safe enough reasoning, that is *if* it *was* going and was *not* going in the "Springbok," it must have been going in another vessel!

But as evidence or grounds for this demonstration, it will be perceived, the Court have added nothing to what appears on the face of the cargo in its contraband features. That is to say, contraband nature and hostile destination, as matter of fact, being *both* necessary to condemn, the Court infers the latter from the former. What is this but to condemn, on the *contraband nature alone*, not only when the hostile destination is not proved, its vehicle not suggested, and the port not surmised, but on a conceded destination of the intercepted vessel being neutral.

(5) Conscious that *this* reasoning has gained no support or evidence beyond the nature of the cargo (*i.e.*, of one per cent. of the cargo), the Court looks for the elements of *probability* in the *moral* evidence, furnished by the owners of this cargo having had connection with previous enterprises to break the blockade.

To be sure, the *fact* in regard to Begbie (and to the voyage of the "Gertrude" which furnishes this moral evidence against him, for his share), is unluckily made to work this imputation, not upon a voyage of the "Gertrude" *before* but *after*, the "Springbok's," as we have already pointed out. Little as we think of an argument to infer a *meditated* illegal adventure for the cargo of the "Springbok," because the owners of such cargo had *before*, in another adventure, planned a violation of the blockade in which they *had been* detected, we confess its value, compared with an argument of present guilt in the "Springbok's" adventure, because a *subsequently* planned and perpetrated violation of blockade had been traced to the owners of the "Springbok's" cargo.

But as the Court find this *moral evidence* against the cargo of the "Springbok," also, because S. Isaac, Campbell & Co. *had been* concerned in the case of the "Stephen Hart's" voyage to a blockaded port, we will consider how this proposition stands as matter of prize law, to which neutral nations are bound to submit.

The proposition is this: S. Isaac, Campbell & Co. were connected with the voyage of the "Stephen Hart," which was interrupted on her voyage and made good prize for intent to violate the blockade: *therefore*, S. Isaac, Campbell & Co.'s interest in the "Springbok's" cargo is good prize of war, as contaminated with the guilt of the "Stephen Hart's" adventure. It is plain that, as a substantive ground of fixing a guilty destination in the "Springbok's" cargo, this reasoning violates every principle of the administration of justice. It is using *moral evidence* of former participation in a proved independent voyage, to prove the very *corpus delicti* of the voyage in question itself, instead of employing it to prove the intent which makes criminal the *corpus delicti*, when that has been proved, as it must always be, as an actual occurrence or transaction.

(6) But the Court recoils, at last, from this groping in the dark and in the future—from this phantom ship, built and rigged from keel to top-mast from moral reasoning, and, on the German method, evolved from the consciousness of the reasoner—and demands some *fact* in which this *probable* future voyage may find a vehicle and an opportunity. It finally supplements these "insufficient grounds for a satisfactory conclusion," by the *fact* "of the presence of the 'Gertrude' in the harbor of Nassau . . . about the time when the arrival of the 'Springbok' was expected there"; and from this *fact* the conclusion which condemns the cargo of the "Springbok" is finally deduced, as follows: "It seems to us *extremely probable* that she had been sent to Nassau to await the arrival of the 'Springbok,' and to carry

her cargo to a belligerent and blockaded port, and that she did not so carry it *only because the voyage was intercepted by the capture.*"

Now, there is no pretence that the ship's papers, the cargo, or the proofs *in preparatorio*, in the case of the "Springbok," connect her, or her voyage, or her cargo, or its destination with the steamer "Gertrude." By invocation, at the hearing, the captors brought in from the case of the "Gertrude," which was captured with a full cargo, laden April 8, at Nassau—long after the capture of the "Springbok"—all the papers they desired, and it is the ownership of the "Gertrude" by Begbie, and her supposed presence at Nassau to await the arrival of the "Springbok," that the Court find damnatory of the cargo of the "Springbok,"

Now, the *fact* utterly fails. The earliest date at which these papers from the case of the "Gertrude" show her at Nassau in April 8, 1863. The "Springbok" was captured within a day's sail of Nassau on the 3d *February*, 1863, and on that day the "Gertrude" was quietly lying at Queens-town in Ireland, where she had just arrived, and whence she had no voyage commenced, or for which she was loaded.

The grave error of fact, out of which the Court made out a vehicle and voyage to carry on the cargo of the "Springbok" to a hostile destination (and without which the cargo could not have been condemned), when corrected, overthrows the whole damnatory hypothesis on which the confiscation is worked out, in the reasons and grounds given by the Court.

This is but one more instance of the very serious consequences of allowing moral reasoning and extraneous, fragmentary, and wholly irrelevant papers, of *res inter alias*, to frame not merely the guilty *intent* of a proved voyage in which a ship has been intercepted, but the very *corpus delicti*, the very voyage itself, which had no existence or hope of existence, except in misconceived fact and purely fanciful reasoning.

(7) But all this seems but an insecure footing for the Court to rest their judgment upon, and they seek some support, however feeble, that appears at least to be chargeable and responsible as the action of the claimants. And this confession or conviction is to come from, what the Court call, "the very remarkable fact," that the claimants never applied for leave to take further proof. The principles of prize law prohibit this recourse to proof *de hors* the ship and her crew at the request of a party. It is to proceed from the Court's own demand or it does not come at all.

At what stage should any such application have been made by these claimants?

If a claimant should make such a request *before* the first hearing, *before* the Court have found a difficulty, such an application would be considered, and in the prize jurisdiction is well understood to be, a concession that on the primary proofs condemnation must be expected to pass. But the whole case shows that these claimants never had reason to imagine that a decree *could* be made by any prize court *on invoked proof in favor of the captors*, without giving opportunity for further proof to the claimants. Besides, on the facts of the case, the claimants could not foresee a condemnation on the ground that this "Springbok" itself was to run the blockade. It cannot be imputed to them as a fault not to have *foreseen* a judgment on grounds which the Supreme Court has wholly repudiated.

Should they have applied after this decree of the district court made on the grounds that it disclosed? They certainly were not wrong in their reliance on reversing the decree of the district court, as the result has shown. No further proofs were necessary to refute the imputation of the "Springbok's" voyage being itself intended to penetrate the blockade and this was the sole ground of condemnation.

Should they have applied to the Supreme Court for leave to take further proofs?

We have quoted above from the treatise of Judge Story, which instructed the profession in the true doctrine of further proof, as emanating from the spontaneous movement of the Court to that end. Besides the doctrine thus laid down, Judge Story gave the practice of the Supreme Court as established and unflinching, never departed from in a single instance, to deny any application for further proof "until the cause had been first heard on the original evidence." (*ut supra*).

We have exhausted every stage or situation in the progress of the cause to which this strange reproach of the Supreme Court is applicable.

The Supreme Court itself, in its judgment, convicted the district court (1) of error in the substance and essence of its sentence, and (2) of irregularity in allowing the captors to invoke proof outside of the captured vessel. It then proceeded to expose the *new* ground of condemnation, viz.: the hypothesis of continuous voyage of cargo by a new bottom, to support it on *suspitions* founded on the irregular further proofs allowed the captors, to confirm it by probable reasons, quite extraneous to the province of the primary proof, and necessarily to be met by further proof from the claimants if the Court thought them weighty enough unexplained to condemn, and yet the Supreme Court condemned without opening the case for further proof. *This* is, indeed, "a very remarkable fact," and we shall have occasion to observe upon it hereafter.

(8) The Supreme Court seems to think it a fault that the claims were sworn to by the proctor and agent of these absent parties, and not by the parties personally.

This imputation requires but a moment's attention. The claims were sworn to according to the rules, which are but a snare, if the meaning is that the acceptance of the allowed convenience is to condemn the property on that ground.

No doubt a prize court may see that its doubts, which

might be resolved by a personal test oath, are not equally met by an agent's verification, however regular. In such case the Court always suggests the difficulty, and awaits from the claimant this form of further proof, and if it be declined, feels at liberty *then* to make a distinction in the weight due to the one or the other.

*The legal theory of "Continuous voyage," considered and defined.*

The doctrine of "continuous voyage," as it has been interpreted and applied by the Supreme Court in cases previous to that of the "Springbok," may be stated thus: A voyage which, at its start from the neutral port of lading for the carriage of contraband to the belligerent's country (or innocent cargo to a blockaded port of the enemy's country) includes in its project and design this destined deposit of its lading in the enemy's ports, is open to belligerent interception, *from the start*, although it should appear that the ship and cargo were actually seeking a neutral port when intercepted, *provided* it should, also, appear that from the neutral port the cargo was intended to be, *as a part of the original and planned adventure*, carried to the enemy's port. And, this latter element of the completion of the transit from the first neutral port of departure to the enemy's port being embraced in the original guilty scheme, the fact that the carriage from the intermediate neutral port was to be by transshipment, and taken up by a new bottom, does not purge the adventure of its guilt, or protect the first stage of the voyage from interception, and the ship and cargo from condemnation. The doctrine is as extremely stated in the head-note of "The Bermuda," 3 Wallace, 515, as anywhere:

*A voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct and whether without the interposition of one or more intermediate ports; and whether to be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose.*



The recognized doctrine, of which we make no complaint, that vessels carrying cargo "to belligerent ports under blockade are liable to seizure and condemnation from the commencement to the end of the voyage," (The *Bermuda*, *ut supra*), is thus thought to be made applicable to a project of violation of blockade, at any stage of its execution, although such project included intermediate ports and transshipment and carriage by new bottoms.

The condition of proof, and the interpretation of it, which, in this extreme case of the "*Bermuda*," was thought by the court to justify condemnation, must not be overlooked and should be carefully weighed. It really gives the *measure* of the doctrine of the Court, laid down in that extreme case on the subject of "continuous voyage."

The Court concludes:

What has already been adduced of the evidence, *satisfies us completely that the original destination of the "Bermuda" was to a blockaded port; or if otherwise, to an intermediate port, with intent to send forward the cargo by transshipment into a vessel provided for the completion of the voyage.*

The Court found sufficient evidence that either the "*Bermuda*" herself or her tender, the "*Herald*," was to *complete the voyage and penetrate the blockade*, and condemned both ship and cargo.

With the doctrine of continuous voyage, as thus limited and defined (and made to depend for its application on a *proved* voyage reaching from a neutral to a belligerent's port, by ascertained vessels completing the project in a scheme which is intercepted only by the capture), there is nothing in the case of the "*Springbok*" that involves us in any necessary controversy. The important question, for neutrals, is, whether trade between neutral ports to which the actual voyage intercepted is really confined, is to be made guilty, by surmise, conjecture, or moral evidence, and that, even, not of the further carriage and further carrier, but only of a

probability that such supplementary further carriage, and *some* supplementary carrier may or must have been included in the original scheme of the commercial adventure.

If a belligerent prize court can thus be master of a neutral commerce by this *fiction* of continuous voyage for the case of all trade between neutral ports, which has its stimulus from the state of war, why, then we have a paper blockade of the neutral ports in question, and their commerce is at the mercy of the belligerent.

A little attention to the course of the prize jurisdiction on this doctrine of continuous voyage, will show how carefully the province of probable reasoning has been confined to convicting of *intent*, when the *corpus delicti*—the voyage to the enemy port—was proved with the same definiteness of vehicle, and port, and process of execution, as, confessedly, is essential when the voyage is direct and simple.

The doctrine of continuous voyage had its origin and its principal illustration in the prize courts in the trade between the Colonies and the parent State during the European wars of the last century and the early part of the present. The question, as it presented itself, was of this kind. Trade between European States and their transmarine colonies, in time of peace, was not open to the navigation of other nations. When, under the stress of war, any one of these States threw open this interdicted colonial trade to neutrals, the hostile Power refused to recognize this as lawful neutral commerce. On the contrary, it was treated as succor to the enemy, in relief of its trade, which the war had strangled, and the belligerent captured and condemned the ships and cargoes of the neutral as if an enemy; but, as trade between the colonies and the neutral, and between the neutral and the European States, was incontestably open to the neutral, a trade was attempted of colorable importation from Cuba, for instance, to Boston, and exportation from Boston to Spain, and so of return cargoes through the interposition of a neu-

tral port. This scheme was denounced, and this commerce attacked by the belligerent. The question for the prize courts was, whether the importation into, and the exportation from, the neutral port, were really transactions of the neutral's own, and, of course, legitimate commerce, or whether it was really a trade between the colony and the parent State, and the interposition of the neutral port was only colorable.

An examination of the cases under this head of prize law will show two things which mark a firm and just observation of the limits between the actual proof of the *corpus delicti*, and the province of moral reasoning in deciding on the *intent* of the transaction.

The captures were made in the voyage *from the neutral port to the enemy port*, and then, the cargo showing its origin as of the proscribed commerce, the complete circuit of transportation, as matter of fact, of colonial produce to the parent State (or *vice versa*)—that is, the *corpus delicti* was incontestable. But the prize court never assumed upon interception of the voyage *to the neutral port*, to invent or surmise, out of the state of trade and its profits and temptations, the further voyage *from the neutral port* which was necessary to the *corpus delicti*.

The second point to which we seek attention is, that when, on this state of proofs of the actual circuit of the prohibited trade, the prize court found any basis for suspicion that the apparent importation and exportation to and from the neutral port was colorable and not real, the court did not condemn, but always opened the case to the claimants for *further proof*—that is to say, there being before the court an actual voyage which is guilty or innocent according to the sincerity of intent in the transaction, it will not *condemn* unless the neutral fails to meet an opportunity for making clear what, in its nature, it must be in his power to make clear.

But observe, how much stronger was the position of the

neutral in the case of the "Springbok," as it stood before the prize court. Instead of the *voyage* before the Court being guilty or innocent upon a question of *intent* to be explored, it was absolutely innocent, unless and until an *additional voyage* should come into play to make out the *corpus delicti*; and then, but not till then, the neutral might fairly be called upon for further proofs to exculpate or inculpate him in such intent, *ab initio*, as would support condemnation.

See the important cases of: *The Polly*, 1 Rob., 361; *The Maria*, 5 *ib.*, 635; *The William*, *ib.*, 385; *The Thomysis* Edw. Adm. Rep., 17.

How far neutrals will finally acquiesce in this doctrine of "continuous voyage" in its threat to the freedom of their commerce, it is not for us to predict. But we may safely suggest to the wisdom and justice of this International Tribunal, that the limits of the prize jurisdiction must be strictly confined to judging, on probable reasoning, of the culpability, under the law of nations, of the property subjected to its sentence, and not allowed to raise the supposed culpable voyage itself out of the clearly innocent neutral voyage, upon surmise and conjecture.

We are apt to think of these questions of continuous voyage as chiefly interesting to Great Britain, with her transmarine possessions, and not to a country like the United States or Italy, without them. But the United States, with its immense sea-coasts on the Atlantic and the Pacific, and Italy, in its position half-way between the Levant and the Atlantic, both occupy positions of the greatest interest on this question. Is the whole coasting-trade in dry goods and breadstuffs between northern and southern ports, and in cotton between New Orleans, Savannah, and Charleston and New York to be exposed to French or British cruisers in a war between those countries, or between either of them and Mexico or South America, because these domestic voyages between neutral ports of this country are to be *supple-*

mented by future voyages of unknown vessels to unknown belligerent ports? Are these cruisers to visit and send in, across the Atlantic, for adjudication, a cotton-laden ship, admitted to be bound from New Orleans to New York, because New York merchants are sending shipload after shipload of cotton to France or to England and it is *probable* the intercepted cargo might have an ulterior destination?

Is Italy, in wars between France and England, or of either or both of them with Russia, on some Eastern or Turkish question, to find its neutral trade molested because what comes to it from the Levant *may* seek a new voyage through the Straits of Gibraltar, and what comes to it through the Straits of Gibraltar *may* have an ulterior destination, by a new voyage, to the Bosphorus, the Black Sea, the Greek "entrepôt" of Syria, or the Suez Canal?

We must think no more important question than this of "continuous voyages," as illustrated by the case of the prize condemnation of the cargo of the "Springbok," can touch either the interests or the pride of neutral maritime States.

*The grave errors in the condemnation of the cargo of the "Springbok," and in the grounds and principles of that condemnation, in the prize court, which entitle the memorialists to restitution and indemnity from the United States at the hands of this International Tribunal.*

If we have been at all successful in impressing the Mixed Commission with the views of the law and estimate of the facts which entered into this final sentence of condemnation, as we understand and have exposed them, our further duty in this argument seems but formal.

That duty, we conceive, will be best performed by defining and concisely stating the points wherein the judgment of the Supreme Court fails to conform to the Rules of the law of nations governing the subject.

I. The original capture was wholly unjustifiable. The visitation and search disclosed nothing which rendered the intercepted voyage of the "Springbok" amenable to further molestation. If the meagreness of the information afforded by the ship's papers, as to the character of the contents of the packages of which it was made up, warranted any further action of the visiting cruiser, such further action could have gone only to a search of the packages of the cargo themselves for evidence of conviction or just suspicion. Upon the result of such search it would have depended, in any case, whether the cruiser would have been justified in sending in the prize. But no such search was made, and no extraneous grounds of doubt or surmise, of course, were accessible to inculcate the voyage.

Now, upon the construction which the visiting cruiser *should* have put upon the voyage which it assumed to intercept, the observations of the Supreme Court exclude any doubt:

Her papers were regular, and they all showed that the voyage on which she was captured was from London to Nassau, both neutral ports within the definitions of neutrality furnished by the international law. The papers, too, were all genuine, and there was no concealment of them and no spoliation. Her owners were neutrals, and do not appear to have had any interest in the cargo, and there is no sufficient proof that they had any knowledge of its alleged unlawful destination. The preparatory examinations do not contradict, but rather sustain the papers. 5 Wall., 21 *ut supra*.

Now, there is no pretence that the examination of the voyage made by the cruiser disclosed any doubt of the neutral ownership of the cargo, or that any such doubt was entertained by the captors, or has been intimated from any quarter at any stage of this case. There is no pretence that there was indication or suspicion of contraband in the cargo that affected the cruiser in sending her in. If every box and bale had been opened, captors of the least experience

in prize would have seen that the presence of the trivial proportion of contraband on board was a moral demonstration that the large and valuable cargo of dry goods and groceries had *not* a destination to a hostile port, or the contraband, of no importance for the profits of the general adventure, would not have been suffered gratuitously to expose the enterprise to ignorant or interested suspicion. But, no matter what the cargo of the voyage between neutral ports, the voyage is free from molestation.

Certainly, none of the confirmations of doubt to the prejudice of the cargo which the prize court drew, by invocation, from extraneous sources, influenced at the time, or can now justify, the captors in sending in this prize. Manifestly it will not do to justify a cruiser in sending in a neutral ship and cargo, taken on a neutral voyage, on the speculation that it *may* be the cargo was to go forward, and if so, *perhaps* it may be provable. It is difficult to understand, on the essential principles of prize law, on what imaginable justification the "Springbok" was sent in.

Mr. Seward communicated to Lord Lyons, who asked for an explanation, the captors' reason, as assigned in the report to the Navy Department, as follows: It was "because she had no proper manifest, and nothing to show the character" of her cargo, which the captain said he was ignorant of. But this reason, as we have before insisted, if well founded, only indicated and justified a search into the character of her cargo, which after all, however composed, was equally lawful between neutral ports.

The mystery of the capture, however, has been publicly explained in her having been denounced by agents of the American Government in England, in advance of her sailing, in a "black list" of vessels intended to run the blockade. This was a mere blunder, by which this deep *sailing* vessel was grouped with a list of shallow draft *steamers*.

But *this* ground of capture of neutral commerce as a justi-

fication to a cruiser could never be tolerated, and the American Government gave instructions to their cruisers that should preclude it thereafter. The details of this matter are given in Appendix A to this argument.

The whole history of this capture shows that it was in itself irregular and unjustifiable, that it was prompted by irresponsible suspicions which had no foundation, and to which the vessel, its lading, its papers, and its destination, neither gave rise nor aliment.

It is a marked case of speculative seizure, detention, and diversion of the voyage, not upon indications which the visit and search at sea disclosed, but in entire absence of such indications. The seizure was, apparently made on the chance that independent, extraneous and argumentative grounds of suspicion might possibly warrant it.

On the ground, then, that the *capture* violated the right of the neutral, and exceeded the privilege of the belligerent, the restitution and indemnity demanded should be accorded.

II. The trial in the prize court violated the essential principles of the prize jurisdiction as established between belligerents and neutrals and in which the latter find the limits of their exposure and submission. The only theory upon which the method of a prize court in condemning property sent in for adjudication can be justified is that the proof furnished by the ship's papers, the cargo, and the depositions of all on board are, so to speak, the ship's own story of the voyage, told by itself, and it is not unfair to condemn it thus out of its own mouth. It is for this reason that Judge Story has so emphatically said that this confinement of the proofs rigidly within these limits, "is not a mere matter of practice or form; it is of the very essence of the administration of prize law." Not less thorough and comprehensive is the declaration of the eminent English authorities we have quoted: "In this method, by courts of admiralty acting according to the law of nations and par-



ticular treaties, *all captures at sea have immemorially* been judged of in every country in Europe. Any other method of trial would be manifestly *unjust, absurd, and impracticable.*" (Sir William Scott, etc., *ut supra.*)

Now, at the original hearing in prize the *advocate for the captors* (not the United States attorney representing the Government), invoked papers from the case of the "Stephen Hart" to form part of primary proofs to condemn the "Springbok" and her cargo. Notwithstanding the strenuous objections of the claimant's advocate this proof was received, and it entered into the sentence of condemnation, which the court proceeded to, *without giving the claimants* an opportunity to give on their part further proof.

Upon this unprecedented proceeding, which the Supreme Court condemns as irregular and not "in accordance with the rules of proceeding in prize," the court of last resort, nevertheless, does not hesitate to draw from this extraneous proof its suspicions and its damnatory conclusions.

In truth, it must be admitted, as it seems to us, that the Supreme Court entirely missed the point of the principles of prize procedure to which we have called attention, treated it as an irregularity in *form*, from which no harm had come, and proceeded to condemn the property without opening to the claimants an opportunity for further proofs.

This trial and condemnation, then, were unprecedented and subversive of the principles of prize jurisdiction, and the memorialists have been deprived of their property by a method not known to the law of nations and not assented to by neutral powers. Upon this ground the memorialists are entitled to restitution and indemnity from the United States.

III. The passing of condemnation without giving an opportunity for further proof was a manifest injustice, and the proofs now presented to the Mixed Commission show the completeness of the *facts* of the case which the memorialists

have now proved to refute the hypothesis and allay the suspicions upon which the condemnations passed.

(a) The mere fact that the captors had been allowed at the first hearing to introduce extraneous or further proofs (an unheard of proceeding) made it necessary, on every principle of prize law, that the difficulties thus raised should carry the conclusion of the court, at such hearing, no further than the demand of further proof, if it was not ready to acquit.

(b) But, most assuredly, when the ground of condemnation was not on the voyage intercepted, but upon conclusions of the probability of a future but unascertained voyage (being a conjectured guilty supplement to an innocent voyage) the nature of the ground of difficulty precluded a condemnation unheard as to the probable and conjectural guilt, which was found, if at all, *de hors* the primary proof against the claimants, who had never been admitted, on their part, to proofs outside the primary proofs. (Story on Captures, p. 25, *ut supra*.)

As a matter of most elemental reason and most universal practice in prize courts, further proofs should have been allowed the claimants. The absolute condemnation was contrary to the right and system of the prize jurisdiction. On this ground the memorialists are entitled to restitution and indemnity.

IV. The precise form in which the presence of the trivial amount of *contraband* (so regarded by the Court) on board the "Springbok" operated in effecting the condemnation of the *whole* cargo is somewhat obscure. Apparently the substantial consequence given to this portion of the cargo by the Supreme Court, in their judgment, was as evidence that that part of the cargo was not to stop permanently in Nassau, but was meant for an ulterior market. Instead, however, as would have been the legitimate reasoning on the subject, of condemning the contraband alone upon this

evidence of *its* destination, it is made to inculcate the whole cargo, not on the ground of contraband contamination (as belonging to the same owners), but because of *inferential* destination for the same market as the contraband, and of such destination involving a purpose of breaking the blockade, as the whole coast was under the blockade. But if the condemnation rests upon the carriage of contraband, and not upon the intended breach of the blockade, it was contrary to sound principles to confiscate a great and valuable mass of innocent cargo from the presence of the dozen swords and bayonets and those military buttons. Even these trivial quantities should not themselves have been confiscated, and certainly they should not have condemned the mass of inoffensive lading. The eminent German jurist, Dr. Ludwig Gessner, says:

It is wrong to seize contraband goods in a neutral vessel when they are in such small quantities that their inoffensive character is thereby established. The *bona fides* is a question to be determined by all the circumstances of the case, among which the *quantity* is a very material ingredient. (*Droit des Neutres sur Mer*, p. 122; See 3 Phill., 358; 5 Rob., 334.)

V. But for the reasons which we have heretofore stated, in testing and weighing the importance of the grounds given by the Supreme Court for this condemnation, its sentence wholly fails of support in law or in fact. The condemnation proceeded, no doubt, upon the hypothesis of a breach of blockade by a continuous voyage planned for the cargo from the start, commenced by lading on board the "Springbok," and in progress towards consummation when intercepted.

(a) Treating, as we must, the doctrine of the "Bermuda" as expressing the *law* of "continuous voyage" as held by the Supreme Court, we find not a particle of evidence to sustain the condemnation of the "Springbok's" cargo, within that doctrine. That doctrine requires, an exhibition, by the proofs, of the vehicle and voyage, whether by means

of a new bottom or not, which was to consummate the breach of blockade. In the case of the "Bermuda," the Court found, on the proofs, such a vehicle and such a voyage.

In the case of the "Springbok," no such vehicle and no such voyage are exhibited upon the proofs. The service of the "Gertrude" for the continuance of the carriage of this cargo, the only project the court entertained as *probable*, signally failed. The "Gertrude" was on the other side of the Atlantic, and her blockade running was independent of, and subsequent to, the Springbok's commerce.

Thus, upon the law of the "Bermuda," the condemnation of the "Springbok's" cargo was without any support of evidence or fact.

(b) It cannot, indeed, be doubted that the doctrines upon which the Supreme Court based its condemnation of the cargo of the "Springbok," while they acquitted the ship and held its voyage wholly lawful, are far looser and more extensive than those of the "Bermuda," or any previous case.

This doctrine of "continuous voyage," as applied in the case of the "Springbok," which permits interception during the innocent voyage between the neutral ports, and condemnation of cargo only, *upon destination to ultimate market inferred from the demand for such cargo in the enemy ports*, scatters to the wind all the limitations on belligerent interference with neutral trade which are confessedly to be observed when the voyages are *direct* between the enemy and the neutral port; it breaks down all the safeguards of the prize procedure, widens the province of circumstantial or moral evidence so as to embrace the proof of the *corpus delicti*, and, in fact, exposes neutral trade between neutral ports, which the war develops injuriously to belligerent interests, to suppression *as itself unlawful*.

No doubt belligerents chafe under the opportunities which purely neutral trade between domestic neutral ports may furnish to advance the carriage of supplies (contraband or

intended for breach of blockade) to the *outposts* of the neutral nation, and thus shorten the transit of supplies which is exposed, by the law of nations, to the lawful interference of belligerent power. No doubt, in the Civil War in America, this development of neutral trade between Great Britain and her transmarine possessions, near to the blockaded rebel coast, was seriously detrimental to the belligerent interests of the United States.

No doubt, the cruisers and the prize courts were justified in vigilance and activity to prevent the voyages between neutral and belligerent ports open to condemnation by the law of nations, from being dissembled under the cover and guise of neutral destination up to the line of neutral intercourse, and there run into the blockaded ports.

But, on the other hand, it is equally clear that the cruisers and the prize courts are not to be permitted by neutral nations to do indirectly what would be just ground for resentment and even war, if done directly. The peace of the world is not to be secured in that way.

Upon the whole, then, it is respectfully submitted, that the case of the "Springbok's" cargo, if suffered to remain unreversed as a rule of the law of nations, gives to belligerents a power which, heretofore, they have never dared to claim, and subjugates the commerce of neutral nations to belligerent exigencies to an extent never before submitted to, an extent not tolerable either to their interests or their pride.

The rule thus established gives to the cruisers and the prize courts a wider and more uncontrolled sweep of interference with commerce between the proscribed neutral ports than they possess in respect to commerce between neutral and belligerent ports.

A paper blockade of the neutral ports, not tolerable towards the enemy's ports, capture and sending in for adjudication vessels that cannot by possibility convict or acquit

themselves on the primary proofs—for *they* cover only the present and innocent voyage—condemnation upon *inter* of future voyage, not commenced, necessarily upon *extra* proofs, if at all—all these strange consequences follow from this new doctrine of belligerent right and neutral subserviency.

It is, in nature and substance, an enlargement of the domain of good prize of war, to the theatre of neutral trade between neutral ports, upon the *fiction* of possible continuous voyage for cargo, yet to be named and framed.

The future interests of the United States imperatively demand that the barriers against belligerent pretension which this case of the "Springbok" has overturned, should be firmly re-established by the judgment of this International Tribunal.

We may well conclude this argument to the justice and benevolent wisdom of this enlightened Commission, by the grave counsels of the celebrated French publicist, Count Portalis, as given by him to the prize courts of France, on their installation in 1800, in the midst of the fiercest wars:

Courts of law deserve the severest censure when, instead of proceeding on the principle of international law applied with equity, and in a manner rather favorable to neutrals, they take for their point of departure the interest of the belligerents. State policy may have its plans and mysteries, but on the bench, reason should ever maintain its empire and its dignity. When arbitrary pretexts, founded on fear or selfishness, direct the judgment seat, all is lost. By inspiring terror, you may, for a moment, increase your strength, but it is by inspiring confidence that you will maintain it permanently.

In the confident expectation that this Mixed Commission will make restitution and give indemnity to these memorialists for the unwarranted condemnation of the cargo of the "Springbok," we have occasion further to consider only the proper pecuniary expression of that indemnity.

*The amount to be awarded to the Memorialists.*

There seems to be no reason to doubt that the appraisement in the market at Nassau, as given in the memorialists' proofs, is the reasonable measure of their damages, and that sum, with interest, should be the measure of the memorialists' indemnity.

The great value of this cargo, and that the Nassau appraisement was not excessive, may well be inferred from the forced sale by the marshal in a market for which the cargo was unsuited. This sale produced very nearly \$250,000.

That *interest*, for delay in satisfaction, is a necessary and component part of indemnity, should be considered as settled between the United States and Great Britain, at least, by the award of the Geneva tribunal on the Alabama claims.

There, after special and full argument by counsel on both sides, on this very question of *interest*, ordered by this tribunal, the award embraced interest to the amount of some \$5,000,000. (See argument and award in the "Alabama Claims.")

All which is respectfully submitted.

Newport, R. I., August 18, 1873.

WM. M. EVARTS,

*Of Counsel for Claimants.*

Respectfully submitted,

J. M. CARLISLE,

*H. B. M's Counsel.*

NOTE.

In the "statement" which forms a part of this argument, we have referred to the "Proofs for Defence," introduced by the United States, and authenticated only by the certificate of the Secretary of War.

As those proofs do not purport to contain *any* evidence against the cargo of the "Springbok," in question, or her

voyage, or any prospective voyage for the cargo, we have not regarded their presence as bearing otherwise than towards the *acquittal*, and not the condemnation, of this cargo. But the memorialists, under the form of the certification adopted by the Secretary of War, were warranted in supposing that the *originals* of all papers thus authenticated by copies, were on file in the War Department. Upon the demand of the claimants, however, for the production of an original paper for inspection and verification, it appears that the paper demanded is not in the Department, and, upon further inquiry, that other papers contained in these "Proofs for Defence" are not, as originals, to be found in the Department.

Under these circumstances it is impossible to expect the claimants to submit to have the trial of this cause before the Mixed Commission at all prejudiced by "proofs," lacking, in substance as well as form, every quality of evidence.

The claimants, for the reasons given here and in the said "Statement," respectfully submit that said so-called "Proofs for Defence" should be discarded by the Commissioners from all consideration.\*

W. M. E.

\*The appendix to Mr. Evarts's printed argument is omitted here as not essential to an understanding of the argument itself. The appendix contained the "black list" of British vessels suspected of attempting breach of blockade, an extract from a letter addressed by Mr. Seward as Secretary of State to Mr. Gideon Welles, Secretary of the Navy, as to the duties of naval officers in the matter of seizure of vessels as prize, and a synopsis of the cargo of the "Springbok."



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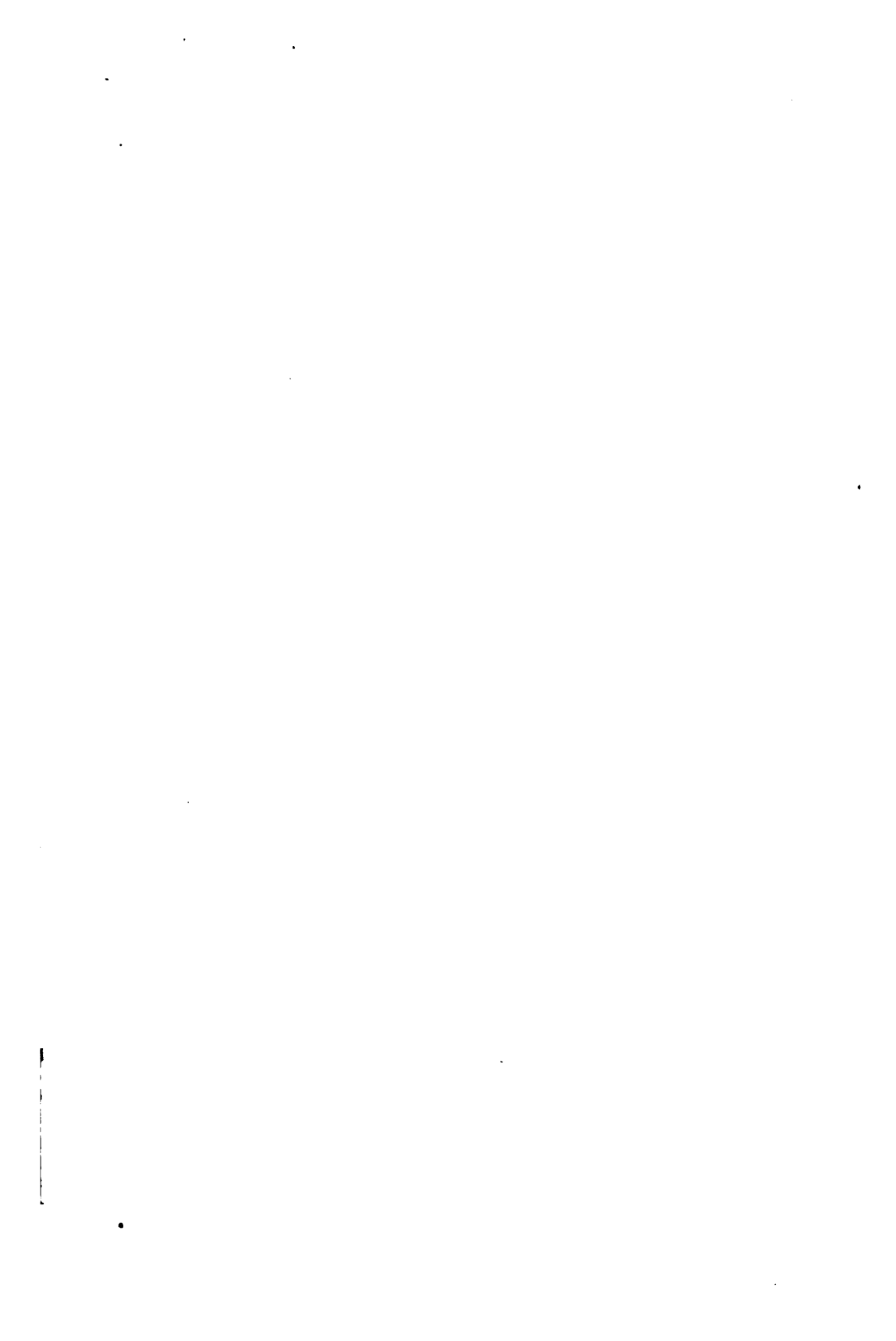
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